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ABSTRACT

The hearings on civil and constitutional rights were conducted to examine the enforcement of the civil rights laws by the U.S. Department of Education. The report contains texts of statements, letters, and memoranda presented statements, letters, as well as supplementary materials presented by representatives of concerned public and private groups. Testimonies and prepared statements of the following individuals are presented: (1) Morris Kinsey, of the Mississippi NAACP Education Committee; (2) Margaret Kohn, of the National Women's Law Center; (3) Nancy Mattox, of the Disability Rights and Education Fund; and (4) Joseph L. Rauh, Jr., of the Leadership Conference on Civil Rights. A letter from Thomas K. Minter, Deputy Commissioner for Elementary and Secondary Education, State of Mississippi to Thad E. Easterwood, Superintendent, Oktibbeha County School District, Starkville, Mississippi is also included. Questions and answers between committee members and witnesses are presented verbatim. (AOS)

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CIVIL RIGHTS ENFORCEMENT IN THE DEPARTMENT OF EDUCATION

HEARING

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
NINETY-SEVENTH CONGRESS
SECOND SESSION
ON
CIVIL RIGHTS ENFORCEMENT IN THE DEPARTMENT OF EDUCATION

SEPTEMBER 30, 1982

Serial No. 98

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CIVIL RIGHTS ENFORCEMENT IN THE DEPARTMENT OF EDUCATION

THURSDAY, SEPTEMBER 30, 1982

House of Representatives,
Subcommittee on Civil and Constitutional Rights,
Committee on the Judiciary,
Washington, D.C.

The subcommittee met, pursuant to call, at 9:30 a.m., in room 2237, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Kastenmeier, Washington, Sensenbrenner, and Lungren.

Staff Present: Ivy L. Davis, assistant counsel; and Thomas M. Boyd, associate counsel.

Mr. **Edwards**. The subcommittee will come to order.

Mr. **Sensenbrenner**. Mr. Chairman, I make a point of order against the holding of the hearing this morning. I make a point of order that rule 11, clause 2, paragraph 4 of the House Rules, as carried out by the Judiciary Committee, has been violated by a failure of the witnesses before us this morning to comply with the following directive of the full committee.

It is printed and says:

> House Committee on the Judiciary will require all witnesses scheduled to testify before it to provide the committee with the minimum of 35 copies of a prepared statement, at least 48 hours prior to the scheduled appearance of the witness.

In light of the violation which is represented by a consistent failure to conform to the 48-hour rule, I believe that my point of order prohibits the testimony of those witnesses until we have had at least 48 hours to review their prepared statements.

Mr. **Edwards**. Anybody else want to speak on the point of order? Mr. Lungren.

Mr. **Lungren**. Mr. Chairman, if I could just——

Mr. **Edwards**. Sure, of course.

Mr. **Lungren**. Mr. Chairman, it is awfully difficult, time and time again on issues which embody facts that are not always at the disposal of this committee, to not get this material ahead of time.

I see nothing wrong with having witnesses come before us to discuss these various issues. In fact, I would welcome it. But it makes it extremely difficult, if not impossible, when as a consistent pattern, I receive either no statements, or as I did last night, receive the statement of Dr. Kinsey about 7 or 8 in the evening.

Luckily, some members of my staff happened to be at my office, and I happened to be there working on something else. But in attempting to try and get a full explanation of some of the issues that are addressed in these statements, I think it puts us at a disadvantage in trying to contact anybody between 8 o'clock and midnight who might shed some light on a subject so that We can prepare what I think are reasonable questions for the witnesses.

Mr. Chairman, if this were the first instance, I would not support the point of order, but this is not the first instance and it is extremely difficult, if not impossible, for me to carry out my obligations as a member of this subcommittee when I am unable to ask intelligent questions.

I would hope that the chairman would understand the difficulty which we have and would rule in favor of the point of order.

Mr. **Sensenbrenner**. Would the gentleman yield?

Mr. **Lungren**. I would be happy to yield.

Mr. **Sensenbrenner**. I would just like to point out that this is not the first time that I have complained about the fact that the 48-hour rule has not been complied with. It was complied with with Mr. Rauh and Ms. Kohn; it was not with Ms. Mattox and Dr. Kinsey.

As the gentleman from California has so very eloquently pointed out, it puts us at a disadvantage in coming up with intelligent questions to adequately ventilate all of the pros and cons of the issues which are being presented before the committee.

I hope that the chairman would get the message that the 48-hour rule does have to be complied with so that we can have a fair hearing with good questions.

I thank the gentleman for yielding.

Mr. **Edwards**. The gentleman from Illinois.

Mr. **Washington**. Thank you, Mr. Chairman. I don't consider the point of order well taken. It occurs to me that there have been, in my brief span as a member of this committee over the past 2 years, at least three or four situations in which there were exceptions to the 48-hour rule.

I don't recall that any member of the committee operated at any great disadvantage. The issues before us today are pretty well brooded about. I am certain that members on the minority side steeped in the knowledge of this issue will be more than competent to deal with this witness here in front of us.

I think the point of order is not well taken.

Mr. **Edwards**. I thank the gentleman.

Mr. Rauh's testimony was here well in advance and Ms. Kohn certainly complied. Ms. Mattox's was here yesterday at noon, Dr. Kinsey's was here at 6 p.m.

The Chair would point out that the Department of Justice a week or so ago gave us about 2 hours' notice on its testimony and no point of order was raised, but I want to assure the gentleman from Wisconsin and the gentleman from California, Mr. Lungren, that the Chair does take this rule seriously and although at this time, because of courtesy to the witnesses, and because we are running out of time, I think it is very important for us to proceed.

The Chair will, with reluctance, overrule the point of order.

Mr. **Sensenbrenner**. Mr. Chairman, I appeal the decision of the Chair.

Mr. EDWARDS. There is an appeal to the decision of the Chair. The question is on the ruling of the Chair: Those in favor of the decision will signify by saying aye.

[Chorus of "ayes."]

Mr. EDWARDS. Contrary minded; no.

[Chorus of "noes."]

Mr. SENSENBRENNER. May we have a rollcall, Mr. Chairman?

Mr. EDWARDS. Rollcall is requested.

The Clerk will call the roll.

The CLERK. Mr. Kastenmeier.

Mr. KASTENMEIER. Aye.

The CLERK. Mr. Washington.

Mr. WASHINGTON. Aye.

The CLERK. Mr. Sensenbrenner.

Mr. SENSENBRENNER. No.

The CLERK. Mr. Lungren.

Mr. LUNGREN. No.

The CLERK. Mr. Edwards.

Mr. EDWARDS. Aye.

Mr. SENSENBRENNER. Mr. Chairman, I have Mr. Shaw's proxy, no.

Mr. EDWARDS. The subcommittee will recess for 15 minutes.

[Recess.]

Mr. EDWARDS. The subcommittee will come to order.

Mr. SENSENBRENNER. Mr. Chairman, I make a point of order that the recess that was declared by the chairman was not in order, and I refer to this rule that says that the speaker may not declare a recess during a rollcall. That is on page 799.

Mr. EDWARDS. Well, the Chair of this subcommittee is not the Speaker of the House of Representatives.

Mr. SENSENBRENNER. But, Mr. Chairman, the House rules apply to committees and subcommittees unless the committee or subcommittee expressly adopts a rule that is not in conformity with the House rules.

Mr. EDWARDS. Well, the Chair disagrees and overrules the objection. The subcommittee will come to order.

Does the gentleman desire further time?

Mr. SENSENBRENNER. Well, Mr. Chairman, I would just like to point out that with that latest statement, together with the fact that both the House and committee rules are very clear, it seems to me that this subcommittee is becoming a subcommittee of people rather than of rules.

Mr. EDWARDS. The subcommittee will continue its review of civil rights enforcement by the executive branch. This review will progress through the 98th Congress. The subcommittee has requested enforcement data from a number of executive agencies which have established criteria for complaints investigation and resolutions.

We will seek additional data as we continue this review. In almost all instances, these agencies' enforcement role is restricted to the administrative proceedings. Accordingly, we will also look to the response of the Department of Justice to cases referred to it by other agencies for litigation when their efforts to achieve voluntary compliance have failed.

Today, we are going to begin several days of hearings on the Department of Education's enforcement of title VI, title IX, and section 504. These provisions prohibit discrimination against minorities, women, and the handicapped, in federally assisted programs.

The Department's Office of Civil Rights has primary enforcement responsibility for these provisions. In the past, that enforcement has been exemplary. For example, the fund cutoff sanction of title VI was used by OCR to effectively desegregate the Deep South and border States' public schools from 1968 to 1972.

Since then, the Department has been sued by civil rights groups for failing to enforce these civil rights provisions. In fact, Department officials are currently responding to contempt proceedings for failure to adhere to the court orders in those cases.

Secretary Bell and Harry Singleton, Director of the Office of Civil Rights, have accepted our invitation to testify, and they are going to do so.

This morning's witnesses are all actively engaged in advocating the rights of the groups protected by this legislation.

Today, without further ado, let me welcome Mr. Joseph Rauh, who has probably been more responsible for civil rights decisions, and for work in civil rights, for more years than either he nor I care to remember, but we are delighted to have you, Mr. Rauh.

Are there any statements to be made, either by Mr. Kastenmeier or Mr. Washington?

We apologize for the delay.

Mr. Sensenbrenner.

Mr. SENSENBRENNER. Mr. Chairman, I did have an opening statement, but I think it is absolutely useless to conduct kangaroo-court committee hearings when the minority is not given the testimony of two of the witnesses until at the close of business, or considerably thereafter, on the day preceding the morning hearing.

Now, I had always thought that this committee and this subcommittee had taken upon itself strict compliance of the rules, and also wanted to make sure that all of the issues at its proceedings were adequately and fairly ventilated, and intelligent questions drafted.

Now, this is not the first time that I have complained about the fact that witnesses' testimony did not come before the minority until the night before, as everybody was leaving.

I have warned the chairman of this subcommittee repeatedly that I think that the committee directive, which is published by the Government Printing Office, requiring 48 hours filing of prepared statements, ought to be adhered to, and this committee has consistently and repeatedly decided not to do that, insofar as at least the three minority members and our staff are concerned.

Now, I regret that there is a disruption in this hearing, but it seems to me that if this is a Government of laws rather than of people, then we ought to at least give the minority a fair shot to draft questions and to be able to question the witnesses who come before us.

Mr. Chairman, I think that we are being treated extremely unfairly; this is not the first time that this issue has come up, and I would wish that the chairman, sometime, would tell the witnesses that if they do not have their statements in on time, they ought to appear sometime later.

Mr. **Edwards**. Well, I thank the gentleman for his observations and I would like to point out to the gentleman from Wisconsin that the Chair bent over backward in respecting his request.

The rule is not as the gentleman stated. Let me read section 113(d) of the Legislative Reorganization Act of 1970, it provides that "Each committee of the House of Representatives shall," and I emphasize the following phrase, "insofar as practicable, require all witnesses appearing it to file in advance."

It would not be subject to a point of order. The Chair assures the gentleman from Wisconsin that we will make every effort to comply with this suggestion, this rule, insofar as it is practical and——

Mr. **Sensenbrenner**. Will the gentleman yield?

Mr. **Edwards**. Yes. We will do better in the future.

Mr. **Sensenbrenner**. Will the gentleman read the next paragraph of the printed "Notice to Witnesses" on the letterhead of the Committee on the Judiciary.

Mr. **Edwards**. Yes. 'The House Committee will require all witnesses scheduled and it is recommended," and so forth. I think we understand each other. We will do better and we understand your situation.

Mr. **Sensenbrenner**. If the gentleman will yield further, it says that the:

> Committee on the Judiciary will require all witnesses scheduled to testify before it to provide the committee with the minimum of 35 copies of a prepared statement at least 48 hours prior to the scheduled appearance of the witnesses.

I might point out that one time when I was appearing before another subcommittee of this committee, the chairman, through his staff, did require me to comply with the 48-hour rule and I did, even though my staff spent the whole night up at the Xerox machine copying the material off so that it would be in by 9:00 o'clock in the morning.

At that time, I made some allegations and some statements of fact that I thought ought to be researched so that I could be questioned on those claims, and that is why the 48-hour rule is there.

Now I do not condone violating the 48-hour rule, whether it is done by individual witnesses or done by the Justice Department. That rule is there so that the committee can have both sides ventilated at a hearing and it is very difficult to do so when we do not get the statements until after everybody has gone home.

Mr. **Edwards**. Well, I thank the gentleman and Mr. Rauh, you are recognized.

TESTIMONY OF JOSEPH L. RAUH, JR., GENERAL COUNSEL, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. **Rauh**. Mr. Chairman, members of the subcommittee, I am Joseph L. Rauh, Jr., a practicing attorney here in Washington in the field of civil rights and general counsel of the Leadership Conference on Civil Rights.

In both capacities, I want to express to this subcommittee my deepest gratitude and appreciation for the oversight hearings you are conducting.

But, since this is the first time I have testified here since the Voting Rights Act was enacted in August, I also want to thank the members of this committee for their work on that act. I want to thank the chairman for the magnificent job that he did, I want to thank Congressman Kastenmeier and Congressman Washington for the fine support they gave the chairman, and I want to thank Mr. Sensenbrenner for the work that he did on the bill.

I think the way that most of Mr. Sensenbrenner's party also supported the bill was a great tribute to the bipartisanship that we were able to get there, and all four of you here have the deepest thanks of the leadership conference for your work on that bill.

We come now to a more difficult subject. The civil rights community desperately needs the help of this committee in its struggle to resist the administration's counter-revolution against civil rights and its efforts to lay bare the current hostile attitudes of the administration toward the enforcement of the civil rights laws of the Nation.

There is no better place to start your oversight than with the sorry record of the Department of Education in 1981 and 1982.

May I insert my full statement and then not have to follow every line of it?

Mr. **Edwards**. Without objection, so ordered.

Mr. **Rauh**. Late one evening last year, I was sitting at my desk and the phone rang. A voice I had never heard before said:

> Mr. Rauh, you have been working for the cause of school integration a long time, and I just have to help. You should know that Education Secretary Terrel Bell is philosophically opposed to enforcing civil rights laws; he has put it all down on paper in a letter to Senator Laxalt that I have here.

I believe it was a young man in the department—he sounded that way on the phone, although I have never seen him and never met him. When I asked for the letter, he said, "I don't know, my job is at stake," and I did not want to press him. But the next morning when I came into the office, there was a copy under the transom, a letter from Secretary Bell to Senator Laxalt.

Wherever that young man is, I would like to thank him because I think it helps the cause of civil rights to expose the true feelings of those who are supposedly enforcing the law.

Here is exactly what Secretary Bell, whose sworn duty it is to see that the laws of the land are faithfully executed, wrote to Senator Laxalt, and I quote:

> The Federal courts may soon be after us for not enforcing civil rights laws and regulations. Your support for my efforts to decrease the undue harassment of schools and colleges would be appreciated. It seems that we have some laws that we should not have and my obligation to enforce them is against my own philosophy.

Speaking as one who has long worked for the enactment and enforcement of our civil rights laws, I respectfully submit to this subcommittee and to Secretary Bell himself, that he should not have accepted a position as the head of a Government agency charged with the enforcement of laws for the desegregation of the Nation's schools, when, as he put it himself, "my obligation to enforce them is against my own philosophy."

If Secretary Bell only discovered his philosophical conflict on enforcement after he had entered upon the job, he should not continue in that position. The desegregation of our school systems is far too important to be left in the hands of a man who candidly reports to a U.S. Senator that enforcing the laws on school desegregation is against his philosophy.

The fair and honorable course is for Mr. Bell to resign as Secretary of Education.

There can be no doubt that Mr. Bell's intention was to say to Senator Laxalt that he opposed the enforcement of the school desegregation laws—that is, title VI—and the Constitution of the United States.

It is a coincidence that I happen to be on both sides of this matter, that I happen to be the recipient of a copy of the letter. I also know about how you interpret the letter because Secretary Bell refers to a contempt motion that I had filed in *Adams* v. *Bell* and it is in that connection that he talks about why it is against his philosophy to enforce the law.

He was—I don't know how familiar you all are with our case, *Adams* v. *Bell*. It started in 1970 when John Mitchell and Robert Finch refused to enforce title VI. They said it quite candidly. And we brought a suit to make HEW, the predecessor of the Department of Education, enforce title VI.

We got the court to order some timeframes that the Secretary had to meet; he had to do complaints about segregation and he had to do compliance reviews on segregation and discrimination within a given period.

The motion that we filed that Secretary Bell is complaining about, that he says is against his philosophy to have to do these things, that motion addressed itself to an obvious violation of the court's order.

The court had ruled the Department must deal with these complaints and these compliance reviews within a given time. They were not doing anything like that. And the court has now adjudicated that Secretary Bell was violating the law and his order. Because Federal judges are not so happy holding Secretaries in contempt, that is still open, that is still being considered.

But the fact that they violated the law, the fact he was not enforcing school desegregation, that is what Secretary Bell was referring to and that is not open to question. That is decided by the context of what happened. It was fortunate that the letter went to one who understood it, because of the fact that we are the lawyers for the NAACP Legal Defense Fund in *Adams* v. *Bell*.

It is clear that Secretary Bell does not believe in title VI, that title VI is against his philosophy and that he will not enforce it.

How many other civil rights laws he is against, I am not really able to say. But from the context of his letter which I have attached to my statement, I assure you he is not in love with title IX. But how many other laws he opposes I do not know. You are going to have other witnesses to testify here. That is not why I am here.

I am here, as I understand it, as general counsel of the Leadership Conference and as a private attorney who has handled civil rights cases on the side of minorities to give this overview of the picture of how bad it is down at the Department of Education.

All apart from the letter, if I had never seen the letter, I could have told this subcommittee that it is Secretary Bell's philosophy not to enforce civil rights laws.

It is nice to have the letter because it confirms what I would have said anyway.

Let me just give you three examples out of *Adams* v. *Richardson*, filed in 1970, and all the successors down to *Adams* v. *Bell*. One I have given you—the complaint timeframes which Mr. Bell has deliberately, openly, and judiciously found to have violated. That is not all.

One of the worst segregated situations in this Nation today is higher education. You go take a look sometime. The Banner White School is still 90 percent white in most of these places. The traditionally black school is 90 percent or more black. We still have segregated higher education.

What happened? In this same suit we were trying to enforce title VI in higher education. We finally in 1977, with the help of the Court of Appeals of the District, and the help of the District Court of the District, got criteria issued by the Secretary of HEW on how you desegregate higher education.

These criteria were not everything that we asked for, but they were a lot better than the existing situation. Secretary Bell, at the least, is not enforcing them; at the most, he has abandoned them.

You have over and over again, now, in higher education, nothing being done, despite the fact that there is still segregation. It is 28 years after *Brown* and we still have segregated higher education in many places in America.

The third example likewise corroborates that Secretary Bell is unwilling to enforce the law. As late as May 28 of this year, the Department of Education, his Department, wrote to the superintendent of the Mississippi School for the Deaf, MSD, enclosing a statement of findings to the effect that of the six vocational courses offered to students in grades 10 to 12, two had only black students and two had only male students.

Did they take the money away from them under title VI—did they carry out title VI? No; instead of finding a violation and requiring a specific remedy under the statement of findings, Bell's Department plays patty-cake with MSD, merely stating that, because there are racially isolated classes, as well as sexually isolated classes, MSD should insure that these class enrollments are not occuring as a result of racial or sexual discrimination.

How can anybody believe that you get 100 percent black or 100 percent women or 100 percent men in a place without some effort to accomplish that purpose? Yet Bell does nothing about it.

Secretary Bell's letter to Senator Laxalt was no whim of the moment. The truth of the matter is that he does not believe in Federal enforcement of civil rights.

Let me read you a couple of the things he has said. It is not Joe Rauh saying what Secretary Bell feels; it is Secretary Bell saying what he feels.

Listen to this, and I do have the full documents here from which this is taken if the subcommittee would like to have it.

Mr. EDWARDS. It is a part of your testimony.

Mr. **Rauh**. I have given the quotation from the documents. But if you wanted the whole thing to be sure I was not quoting out of context or something, I have the documents here. I did not want to take a chance that somebody would suggest that the statement was not accurate, and they will be available to the subcommittee if they desire.

Mr. **Edwards**. That will be received. [See p. 13.]

Mr. **Rauh**. Speaking to State educational officials (Council of Chief State School Officers and the National Association of State Boards of Education) in March 1981, Secretary Bell said that the Federal role in monitoring and enforcing laws against discrimination should be trimmed dramatically and that to the extent that it could, the Federal Government should get out of the enforcement business so that the States could assume more responsibility.

Secretary Bell repeated this theme 5 months later in a speech to the Education Commission of the States on August 28, 1981.

"I join you in expressing my indignation over certain Federal laws and regulations that encroach upon State and local authority."

And finally, Secretary Bell describes the Reagan administration's policy as the States' rights approach to enforcement.

Speaking at the University of Texas in Austin in August 1981, he announced:

"The Reagan administration is committed to working with the States rather than policing them, particularly in such sensitive areas as civil rights."

Heavens above, if there is anything we have learned in this country, it is that civil rights enforcement is a Federal necessity. The States cannot regulate themselves. I mean, who have been the violators of the civil rights laws; it is the State officials themselves.

Is Bell suggesting that Gov. Paul Johnson of Mississippi in the old days should have been allowed to enforce the civil rights laws when he was the perpetrator of the wrongs?

It is the people who are committing the wrongs that Secretary Bell is suggesting should have the right to enforce the law.

This is one area—I am sure there are many others—where the Federal Government alone can operate. But this is the most obvious area where only the Federal Government can deal with officials in the States and the cities who violate the rights of our black and other minority citizens.

Secretary Bell does not need me to tell him this, he can look at his own files. There he will find, for example, and this is a very recent example, that a complaint was made that in four school districts in Mississippi, (Panola, South Panola, Enterprise and Quitman) the school board was running two separate buses in each district. One bus came around and picked up blacks, one came around and picked up whites. The law was clear and the Department had to put them in the same buses.

Secretary Bell is not just going back a couple of years; Secretary Bell is going back behind the Martin Luther King bus boycott. Yet he still thinks that the States ought to be given enforcement authority.

OCR obviously stopped that most obvious violation. But it shows there are still things going on that only the Federal Government can deal with.

We cannot turn the clock back and say, "Well, I am a States' righter. That issue was fought out in the last generation. We fought that issue out and we won."

When the great Johnson statutes were passed in the 1960's, the Federal Government took on the civil rights responsibility. We have changed America with it. We cannot go back to talking States' rights in civil rights.

There will be no civil rights if there is a State's rights doctrine in that area.

In conclusion, let me just note, after considerable years in this area, civil rights laws are hard to enforce. It is not easy, and I think that is why it is so important that we are here this morning.

Private suits by the injured party take money and time in situations where there is very little of either. Private suits to require the executive branch of Government to do what Congress directed it to do, like my own Adams against Bell, are very difficult to maintain.

We have had a very difficult time over the past 12 years. We have done the best we could, but take it from me, for a private citizen, or a private organization like the Legal Defense Fund, to monitor big organizations like the Department of Education and the HEW before it, were very hard.

Civil rights laws can only be fully and properly enforced by a willing and determined executive branch. This will only happen when there is serious devotion to the task of enforcement by the leaders of the agency involved. It cannot and will not be done by people whose philosophy is against the enforcement of those laws.

Thank you, Mr. Chairman.

[The statement of Mr. Rauh follows:]

STATEMENT OF JOSEPH L. RAUH, JR.

Mr. Chairman, I am Joseph L. Rauh, Jr., a practicing attorney here in Washington in the field of civil rights and General Counsel of the Leadership Conference on Civil Rights. In both capacities, I want to express to this Subcommittee my deepest gratitude and appreciation for the oversight hearings you are conducting. The civil rights community desperately needs your help in its struggle to resist the Administration's counter-revolution against civil rights and in our efforts to lay bare the current hostile attitude toward the enforcement of the civil rights laws of the Nation. There is no better place to start your oversight than with the sorry record of the Department of Education these past eighteen months.

Late one evening last year, I picked up the phone in my office and the voice at the other end said: "Mr. Rauh, you've been working for the cause of school integration a long time and I just have to help. You should know that Education Secretary Terrel Bell is philosophically opposed to enforcing civil rights laws and he has put it all down on paper in a letter to Senator Laxalt that I have here." At great personal risk, this Education Department employee sent me a copy of that letter and I have attached it to my statement. Here is what Secretary Bell, whose sworn duty it is to see that the laws of the land are faithfully executed, wrote to Senator Laxalt: ". . . the Federal courts may soon be after us for not enforcing civil rights laws and regulations. Your support for my efforts to decrease the undue harassment of schools and colleges would be appreciated. It seems that we have some laws that we should not have, and my obligation to enforce them is against my own philosophy."

Speaking as one who has long worked for the enactment and enforcement of our civil rights laws, I respectfully submit to this Subcommittee and to Secretary Bell himself that he should not have accepted a position as the head of a governmental agency charged with the enforcement of laws for the desegregation of the Nation's schools when, as he put it himself, "my obligation to enforce them is against my own philosophy"; and, if Secretary Bell only discovered his philosophical conflict on enforcement after he had entered upon the job, he should not continue in that position. The desegregation of our school systems is far too important to be left in the hands of a man who candidly reports to an influential United States Senator that enforcing the laws on school desegregation is against his philosophy. The fair and honorable course is for Mr. Bell to resign as Secretary of Education.

There can be no doubt that it was to the laws on school desegregation that Secretary Bell was referring in his letter. I quote the entire paragraph verbatim:

"Finally, for your information, I am enclosing a copy of a contempt of court complaint that was delivered to my office yesterday. You can see from this complaint that the Federal courts may soon be after us for not enforcing civil rights laws and regulations. Your support for my efforts to decrease the undue harassment of schools and colleges would be appreciated. It seems that we have some laws that we should not have, and my obligation to enforce them is against my own philosophy. Hopefully, the new administration and the new majority in the United States Senate can join in an effort to make some long overdue changes and improvements in civil rights laws."

I am familiar with the contempt of court complaint to which Secretary Bell refers; actually, it was filed in the case of *Adams* v. *Richardson* (now *Adams* v. *Bell*) in which I am chief counsel and which I will discuss in greater detail a little later. We filed the contempt motion to which the Secretary refers precisely because he was refusing to enforce school desegregation as required by Title VI of the Civil Rights Act of 1964, the Fifth Amendment of the Constitution, and the orders of the Courts in *Adams* v. *Bell*. Title VI requires the withholding of Federal funds from schools that segregate or discriminate; a man who says it is against his philosophy to enforce so elementary a law ought not head the Department of Education.

How many other civil rights laws Secretary Bell opposes I cannot say. From the rest of his letter to Senator Laxalt, one would certainly get the impression that Secretary Bell is not too enamored of Title IX and as recently as last month Secretary Bell proposed revising downward the Department of Education's regulations governing protections for handicapped children. But other witnesses will relate the details of the Department of Education's failure to enforce existing laws for the protection of minorities, women and the handicapped. For my part, I would simply like to present to this Subcommittee three instances of the Department of Education's failure to enforce Title VI, the Fifth Amendment to the Constitution, and the orders of the Courts in the ongoing case of *Adams* v. *Bell*.

Back in 1970, we brought the *Adams* suit for the NAACP Legal Defense Fund on behalf of black students and parents to require HEW to enforce Title VI and the Fifth Amendment by withholding Federal funds from discriminatory or segregated institutions. The District Court here and the Court of Appeals for this Circuit issued orders directing HEW to enforce the law. But for Secretary Bell these Court orders, like the laws under which they were issued, are things "we should not have" and his obligation to enforce them is against his "own philosophy." Let me provide just three very current examples which illustrate the philosophy against enforcement in actual practice.

Example 1: In 1976 and 1977 the District Court entered orders directing that complaints of violations of Title VI and compliance reviews be handled within specific timeframes. When it became clear that the Department of Education under Secretary Bell was paying no attention to these timeframes, we filed the contempt complaint referred to by Secretary Bell in the letter from which I have quoted. Federal District Judge Pratt, last March, found that the Department was violating "in many important respects" his orders requiring DE action within specified timeframes. The matter of remedy for these violations of judicial orders is still before Judge Pratt. Secretary Bell, believe it or not, proposes that the District Court abolish all timeframes, apparently as a reward for his violating the existing ones.

Example 2: The Court of Appeals and the District Court in *Adams* v. *Richardson* directed that HEW issue and implement Criteria for the desegregation of higher education. Those Criteria were issued in 1977 and, properly enforced, would have provided the means for substantial integration of higher education in this country. The Criteria provided for the enhancement of the traditionally black colleges (especially by requiring attractive programs at the black colleges which were not available at the traditionally white schools) and required the white schools to desegregate their student bodies, faculties and administrative activities. At best, the Department is today giving only lip service to these Criteria; at worst, it has abandoned them completely. But whichever it is, the Criteria, ordered by the Courts and adopted by

DE's predecessor, HEW, are not being administered today in the interest of ending the segregation which still persists more than 28 years after *Brown*.

Example 3: One of the matters that impelled the Legal Defense Fund to initiate the *Adams* v. *Richardson* litigation was the segregation in the field of vocational education. Indeed, the District Court in that case has been required to issue more than one order directing the enforcement of desegregation in the area of vocational education. Yet, as late as May 28 of this year, the Department of Education wrote to the Superintendent of the Mississippi School for the Deaf (MSD) enclosing a Statement of Findings to the effect that, of the six vocational courses offered to students in grades 10 to 12, two had only black students enrolled and two had only male students. Instead of finding a violation and requiring a specific remedy for the violation, the Statement of Findings plays patty-cake with MSD, merely stating: "Because there are racially isolated classes, as well as sexually isolated classes, MSD should ensure that these class enrollments are not occurring as a result of racial or sexual discrimination." DE is apparently willing for MSD to continue on its segregated way.

I have dwelt on Secretary Bell's letter to Senator Laxalt, but that was no whim of the moment. He has said on numerous other occasions that he wants to see federal enforcement of civil rights laws drastically curtailed. Speaking to state education officials (the Council of Chief State School Officers and the National Association of State Boards of Education) in March, 1981, Secretary Bell said that the federal role in monitoring and enforcing laws against discrimination should be trimmed dramatically and that, to the extent that it could, the federal government should get out of the enforcement business so that the states could assume more responsibility.

Secretary Bell repeated this theme five months later in a speech to the Education Commission of the States on August 28, 1981:

"I join you in expressing my indignation over certain federal laws and regulations that encroach upon State and local authority."

Secretary Bell describes the Reagan Administration's policy as the states' rights approach to enforcement. Speaking at the University of Texas in Austin in August, 1981, he announced:

"The Reagan Administration is committed to working with the states rather than policing them, particularly in such sensitive areas as civil rights."

Instead of making such statements disparaging federal enforcement of civil rights, Secretary Bell ought to take a look at his own files and he will see why federal enforcement is still so vitally necessary. The situation in Mississippi is a good example of the need for continuing federal enforcement.

Upon investigation of citizens' complaints, OCR found racially segregated buses operating in four Mississippi school systems (Panola, South Panola, Enterprise and Quitman). Two buses were going through the same neighborhoods picking up children according to the color of their skin and transporting them to the same schools. OCR got the buses desegregated by requiring the elimination of overlapping, duplicative bus routes. Would the State of Mississippi and local authorities have acted to correct this gross violation of Title VI without the Office for Civil Rights and the right of citizens to file complaints? Or would we be back to the pre-Martin Luther King days of segregated buses?

Let me just conclude on a note based on long years of working in the ranks of those who seek an integrated, nondiscriminatory society. Civil rights laws are at best most difficult to enforce and they are especially difficult to enforce from the outside. Private suits by the injured party take money and time in situations where there is very little of either. Private suits to require the Executive Branch of Government to do what Congress directed it to do, like *Adams* v. *Bell*, are even more difficult to maintain. Civil rights laws can only be fully and properly enforced by a willing and determined Executive Branch. This will only happen when there is sincere devotion to the task of enforcement by the leaders of the agency involved. It cannot and will not be done by people whose philosophy is against the enforcement of those laws.

WASHINGTON, D.C.

Hon. PAUL LAXALT,
U.S. Senate,
Washington, D.C.

DEAR SENATOR LAXALT: Thank you for your letter of April 16. Let me say that I will be reviewing the Department's plan for compliance activities closely, including those affecting intercollegiate athletics.

With respect to your specific questions, the following information was prepared by the Office for Civil Rights (OCR). The budget data used here includes: salaries, benefits, and support costs such as case-related travel and training. A copy of the OCR Title IX Intercollegiate Athletics Enforcement Plan and modification are enclosed for your reference.

1. Of the 1,082 Title IX complaints OCR anticipates closing in fiscal year 1981, 144 are related specifically to Title IX intercollegiate athletic activities.

2. For the resolution of Title IX intercollegiate athletic complaints, OCR anticipates utilizing 12 regional investigative staff years at a cost of $397,620. For general Title IX complaints, OGC has allocated 50 regional investigative staff years at a cost of $1,954,965.

3. OCR believes that approximately half of the regional investigative staff time that was allocated to the enforcement of the Title IX intercollegiate athletics regulations during fiscal year 1981 was expended during the first four months of the fiscal year. However, because the OCR work measurement system now in operation does not measure time expenditure by specific issue or jurisdiction, OCR has no way of knowing exactly how much time has been spent in this area. OCR is in the process of adding this capability to their work measurement system. In an effort to answer your specific question, OCR estimates that approximately six regional investigative staff years and approximately $200,000 was expended during the first four months of fiscal year 1981 on Title IX intercollegiate athletics complaint investigations. OCR records do not show what funding resources are spent by sources outside the Department for this purpose.

4. OCR has allocated 77 staff years to the resolution of Title VI complaints; the budget dollars associated with this activity are $2,551,395.

5. The total regional investigative staff time devoted to complaint resolution by OCR is 296 years. The budgetary resources for this regional activity are $9,807,960.

In retrospect, it seems that the fiscal year 1981 Annual Operating Plan for OCR underestimated the staff needed to investigate compliance with the new Title IX regulations on intercollegiate athletics. In light of this, OCR has narrowed the Title IX intercollegiate athletics enforcement plan to streamline the size of investigations and investigative teams.

In my opinion the Title IX regulations need to be modified. I have already taken action to withdraw the dress code rules written in connection with Title IX. (This action has resulted in a number of vigorous protests, but I do not believe that we have any Federal right to interfere with local issues of length of hair, beards, and skirts on school and college campuses.) I am still reviewing these and other regulations and plan to take action to cut back as much as I can under the law and under the restraints and demands imposed by the courts.

Finally, for your information, I am enclosing a copy of a contempt of court complaint that was delivered to my office yesterday. You can see from this complaint that the Federal courts may soon be after us for not enforcing civil rights laws and regulations. Your support for my efforts to decrease the undue harassment of schools and colleges would be appreciated. It seems that we have some laws that we should not have, and my obligation to enforce them is against my own philosophy. Hopefully, the new administration and the new majority in the United States Senate can join in an effort to make some long overdue changes and improvements in civil rights laws.

Please let me know if this information answers your questions adequately.

Sincerely,

T. H. BELL.

[From the Washington Star, Friday, Aug. 7, 1981]

BELL EXPRESSES DOUBTS ON CIVIL RIGHTS LAWS

EDUCATION HEAD RAPS "UNDUE HARASSMENT"

(By Roger Wilkins)

Education Secretary Terrel H. Bell told a Republican senator last spring that he was philosophically opposed to enforcing some civil rights legislation, and added that the "federal courts may soon be after us" for not doing so.

"It seems that we have some laws that we should not have, and my obligation to enforce them is against my own philosophy," Bell said in a letter to Sen. Paul Laxalt of Nevada, who is President Reagan's best friend in the Senate. "Hopefully, the new administration and the new majority in the United States Senate can join in an effort to make some long overdue changes and improvements in civil rights laws.

". . . for your information, I am enclosing a copy of a contempt of court complaint that was delivered to my office yesterday," Bell wrote. "You can see from this complaint that the federal courts may soon be after us for not enforcing civil rights laws and regulations. Your support for my efforts to decrease the undue harassment of schools and colleges would be appreciated."

The contempt of court complaint was filed two days before by the plaintiffs in an 11-year-old lawsuit against Elliot Richardson, former secretary of health, education and welfare. It sought to force the government to enforce the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964 against Southern school districts and states that were still discriminating against black schoolchildren.

After winning that original suit and having the ruling affirmed on appeal in 1973, the plaintiffs have returned to the district court several times for extensive remedial orders. Those orders established rules under which the Department of Education was directed to enforce prohibitions against discrimination against women and the handicapped, as well as against racial minorities. The contempt complaint accused Bell of failing to enforce the remedial orders.

In a telephone interview yesterday, Bell said that he "agrees with the central purposes" of civil rights legislation, but that "there are a host and range of statutes to be enforced" which are being "forced and stretched so that you don't know what you're doing."

"We certainly have not slackened our response on racial issues," Bell said.

The secretary cited as particularly troublesome rulings by some federal courts that Title IX of the Civil Rights Act of 1964 covers employment discrimination as well as other forms of sex discrimination. He noted that there is a conflict between court rulings on the subject, which creates an area of "ambiguity" he would like to clear up.

Bell also said conflicting interpretations of Section 504 of the Rehabilitation Act of 1973 and Public Law 94-142, which also deals with handicapped children, "whipsaw" local educational officials.

Elliott C. Lichtman, an attorney for the plaintiffs in the 11-year-old lawsuit mentioned in Bell's letter, said yesterday the contempt motion alleged that Bell "has totally disregarded a series of crucial time frames previously directed by the court to redress the central violations found—that the agency had endlessly delayed in the investigation of possible discrimination and in securing corrective action where discrimination is found."

The papers filed in connection with the motion assert that from January through April of 1981, the Department of Education consistently failed to meet court imposed time limits for compliance procedures which the department itself had initiated. The papers also allege that Bell has held up "approximately 80 to 100" letters proposing to find violations of anti-discrimination laws and regulations.

"We have dealt with secretaries under Nixon, Ford, Carter and Reagan in this case," said Joseph L. Rauh, the veteran civil rights lawyer who has also served on this case. "Some others have been unenthusiastic about civil rights, but they pale into insignificance when compared with Bell. His department's disregard of anti-discrimination laws goes across the board—elementary and secondary education, state, college and university systems, sex and the handicapped."

Bell said yesterday that his agency's enforcement efforts have been hampered by the need to streamline regulations while working against court-imposed deadlines, by the need to get rid of some regulations like school dress codes, and by the fact that two key presidential appointees in the department were sworn in only in the last two weeks.

Mr. EDWARDS. Thank you very much, Mr. Rauh.

The gentleman from Wisconsin, Mr. Kastenmeier. We will be operating under the 5-minute rule.

Mr. KASTENMEIER. Thank you, Mr. Chairman. I would like to compliment the witness, who I know personally—I have known him for many years.

He served the cause of the civil rights movement. He is a giant in the movement in much of the law. All the laws we have had in the past 25 years that we have passed are due to Joe Rauh.

His perspective and his insight with respect to the problems still confronting us, with respect to the executive branch, is appreciated.

I think that he has offered us wise counsel in that regard. I only regret, Mr. Chairman, I must excuse myself to the Rules Committee, but I am very pleased to hear Mr. Rauh's testimony.

Mr. **Edwards**. Thank you.

I want to reemphasize something that the witness said about the major contribution that the gentleman from Wisconsin, Mr. Sensenbrenner, made in the enactment of the Voting Rights Act. We really could not have gotten along without him, could we, Joe?

The gentleman from Wisconsin is recognized.

Mr. **Sensenbrenner**. I thank the chairman, as well as Mr. Rauh, for those kind statements. I also thank Mr. Rauh for getting his testimony in 48 hours in advance so we could look it over.

Have you, Mr. Rauh, complained to the court of appeals of your allegations that Secretary Bell is not enforcing or is disregarding the higher education desegregation criteria?

Mr. **Rauh**. Only in one particular instance, and the issue there was not whether they were complying. The issue there was whether the district court here had jurisdiction after the State of North Carolina had brought a suit in North Carolina and the district judge there had accepted the settlement between the State of North Carolina and the Department of Education—which settlement, we say, did not comply with the criteria, but which settlement the court here was not reviewing.

In the Court of Appeals, the Government never did challenge our contention that the agreement did not live up to the criteria. What they challenged was the jurisdiction of the courts of the District to do anything after there had been an end run around the courts of the District by the State of North Carolina and Mr. Bell who made a settlement which violated the criteria and presented it to North Carolina district court.

The issue of whether criteria are being abandoned is now before the district court here. We have shown him that, in a dozen or so States the criteria have in fact been abandoned.

Mr. **Sensenbrenner**. In other words, the Court of Appeals for the District of Columbia did reverse that decision and send it back to the district court.

Mr. **Rauh**. No, they did not.

Mr. **Sensenbrenner**. On jurisdictional grounds.

Mr. **Rauh**. No. What happened, sir, was that the district court dismissed our challenge jurisdictional grounds. He said that North Carolina had jurisdiction. We said, no, they do not have it, because they made an end run to get it. The Court here was first and should have it. He disagreed with that.

The Court of Appeals said the case was moot by a 2-to-1 vote. That is now before the Court of Appeals. I have petitioned for a rehearing and I don't know what will happen.

Mr. **Sensenbrenner**. You mentioned in your testimony that you had brought a contempt motion against the Secretary. Has there been a hearing yet, or has the Secretary been held in contempt?

Mr. **Rauh**. There has been a hearing. The court found that the Secretary, the Department, had violated his orders "in many important respects."

The judge, Judge Pratt, held the issue of contempt for those violations he had found, in abeyance. There have been papers since then, and the question of contempt is pending before Judge Pratt.

The question of violation was found by Judge Pratt.

Mr. **Sensenbrenner**. During these proceedings, did the court indicate that it was entertaining reconsideration of the timeframes which were set forth in the *Adams* decision?

Mr. **Rauh**. No. What the court said was this: If you two groups can get together and agree on modifications, that will be all right. At no time did he indicate that that was what he wanted. He found that there were violations. Then he said, you try to see if there should be some modifications, if you two could agree on them.

Then he said, I will withhold the contempt decision on the basis of the violations. That decision has not come down. But the Government, they did not come and say, well, we will comply with some modifications.

The Government has now moved to get out from under the order completely. In other words, what a dozen secretaries before have had to deal with, Bell says, no, I don't want anything to do with it, I do not want any timeframes, I can take as long as I want, I can take forever. And he had moved for a vacation of the order of 1977.

I am not of the belief that he will be successful.

Mr. **Sensenbrenner**. I have a couple of other quick questions. It seems to me that the problem of complying with the *Adams* timeframes is not new to Secretary Bell or this administration. And that the Carter administration had extreme difficulty in complying with those timeframes as well.

Now, from the information that has been given to me, the former Director of the OCR, David Tatel, testified as your witness at the hearing that he was not able to meet with the timeframes of the *Adams* decision when he served as Director of the OCR in the previous administration.

Don't you think that really the blame for not meeting those decisions is really a bipartisan blame and that you certainly cannot heap all of the scorn on the present encumbent, even though he is the guy that is there now?

Mr. **Rauh**. I have been a critic of the enforcement of civil rights laws bipartisan, with the certainty that no administration has lived up to the hopes that I have had for enforcement.

Mr. **Sensenbrenner**. Certainly is a shame we could not get a hearing on that question 2 years ago to bring you in here.

Mr. **Rauh**. You interrupted me, sir.

Mr. **Sensenbrenner**. Sorry.

Mr. **Rauh**. I had just said "but," there is a difference. Tatel was the first one confronted with the timeframes. He got rid of the backlog and the ones they could not do within the timeframes were within the 20 percent exception Judge Pratt's order permits.

We already had a 20-percent exception. You know, this is a very flexible thing. Tatel was trying to do it. Clarence Thomas, who came to testify for Bell; Bell would not testify; we would have liked to cross-examine him about this. He admitted they were paying no attention to the time frames. I will say for Mr. Thomas that he was very candid about their violations. The Tatel group tried very much to carry this out and I would say for David Tatel, that he substantially carried out the time frames for compliance.

Mr. **Sensenbrenner**. I have a memo in front of me dated April 23, 1980, by Roma J. Stewart, Director of OCR, to OCR regional directors in regions 1 through 10.

It says, "This serves to confirm our recent oral communication with you concerning the current moratorium on title IX, intercollegiate athletic activity." You were told to halt all complaint and review work in this area until further notice. Now this was a product of the previous administration.

Do you think that was in violation of the *Adams* order?

Mr. **Rauh**. I regret that I cannot answer that. There will be a title IX expert here. My view is that there may have been some basis for that, but I cannot say.

We brought *Adams* v. *Bell* on behalf of blacks. The women intervened and have had their own case. My general belief is that the two together have obtained a good deal of enforcement.

Furthermore, there were moments when we were complaining of the Democratic enforcement of the laws. All I would say to you is that, as one who has been in on the enforcement of the laws since they were enacted, I would say that the two worst and they really are not in the same category, were John Mitchell in 1970, when he publicly announced on July 3, he was not going to enforce title VI; and Bell, who has admitted and openly said they were not going to comply with the timeframes.

Mr. **Edwards**. The time of the gentleman has expired.

Mr. **Sensenbrenner**. Thank you.

Mr. **Edwards**. The gentleman from Illinois.

Mr. **Washington**. I, too, want to welcome Mr. Rauh to this committee. Your name in this field, obviously, is legend, and you were a household name in my neighborhood long before I thought about coming to Congress.

I want to join the chairman in commending you on your past work in this field.

I must say that Secretary Bell's statement to Senator Laxalt is not astounding at all. It might have been 2 years ago. I think it is typical of this administration, and we have heard some of the remarks, although not as blatant, from other high authorities in the administration; namely, Bradford Reynolds, who has taken a strong position that certain remedies carved out by the courts will not be utilized by this administration.

So that attitude seems to permeate the entire structure of civil rights enforcement under this administration.

Mr. Bell is supposed to appear before this committee and it will be interesting to see what his response to that statement will be. Or has he ever made a response? Has he ever undertaken to respond or to explain, if he possibly could, the contents of that letter to Senator Laxalt?

Mr. **Rauh**. Roger Wilkins last year did call Secretary Bell about this letter. You see, I am a cautious lawyer and even after the letter was put under my transcom, I didn't assume its authenticity. I gave it to Roger Wilkins, who was then a leading figure on the

Washington Star, and he called Secretary Bell and Secretary Bell authenticated it, and then made an explanation that I did not consider an explanation.

Mr. Bell said he was not saying anything about the civil rights laws in that philosophical statement. It is impossible to read that statement the way Secretary Bell wanted to interpret it.

But, sir, if you are going to interrogate Secretary Bell, I would suggest that the staff get his explanation, which is in the last edition of the Washington Star; it is on page 2 of the day they folded. All that is on page 1 is the story of the folding.

On page 2, the lead story is on this letter and Secretary Bell's then explanation of it.

Mr. **Washington**. The swansong information about the Washington Star.

Mr. **Rauh**. It was in the Washington Star the day of the closing, sir. It is not in my judgment an explanation. It is—well, it is fluff.

Mr. **Washington**. Let's take a look at it. I think you summarized the entire matter very succinctly on page 8, Mr. Rauh, in your last two sentences there.

> Civil rights can only be fully and properly enforced by a willing and determined executive branch.

I might say we simply do not have that at present, but we are going back to some other resources. What would you suggest that advocates of strong enforcement of civil laws resort to at this point in time?

Obviously it appears we will be bogged down interminably in the courts. What would you suggest?

Mr. **Rauh**. All that can be done, sir, outside of the political arena, on which I am sure you were not asking for my opinion, all that can be done is public pressure.

Public pressure does help some. I have referred in my statement to the handicapped regulations they proposed about 6 weeks ago.

Yesterday, they backed down partially. We do not know how far they backed down on the handicapped, but they at least backed down in part. I had thought reading the paper this morning, they had backed down completely, but I am informed this morning that that would be incorrect. They have not backed down completely; they are still going ahead with some of it.

Nevertheless, public pressure by the handicapped, and by people sympathetic to the handicapped, did affect Bell there. And I am suggesting that public pressure can affect him in other areas. I am also suggesting that this airing by your committee is the best thing that can be done and we will be seeking here and elsewhere to bring public pressure on Secretary Bell.

I don't think he listens to me too carefully, so it is unlikely that he will resign. Nevertheless, I believe in public pressure through the committee, the subcommittee, the others in Congress, the organizations—all of us together.

We in the Leadership Conference are 157 organizations and we shall try to bring public pressure to get enforcement. We shall continue with our suit, *Adams* v. *Bell*, although, as I said, it is a sad day in America where private citizens have to press for the enforcement of laws to protect our minorities.

Mr. **Washington**. Perhaps we should have elections every 6 months and we could get something out of this administration.

I will yield now.

Mr. **Edwards**. I thank the gentleman and I think that Mr. Rauh knows this subcommittee, both sides of the aisle, well enough to know that there is not anything political in any of these oversight hearings we are having.

We would be just as tough on a Democratic administration, as on a Republican, and we have in the past. Some of our former employees in the Department of Justice, Civil Rights Division, have felt the lash of this House Judiciary Committee, whether the President was a Republican or Democrat, and certainly this hearing today has no overtones of politics whatsoever.

We just want those people to do their job. We do not want these divisions in the country. We want the Constitution obeyed and we want the laws obeyed. That is our job, that is the oath that we took, all of us here.

I do appreciate your testimony and we're sorry we were delayed.

Mr. **Rauh**. Thank you, Mr. Chairman.

Mr. **Edwards**. Our next witnesses will constitute a panel. Margaret Kohn, Esq., representing the National Women's Law Center; Ms. Nancy Mattox, representing the Disability Rights and Education Fund; Dr. Morris Kinsey, representing the NAACP State of Mississippi Education Committee.

We understand that Ms. Kohn will be first, Nancy Mattox, second; and Dr. Kinsey, third.

Without objection, all of the statements, of course, will be made a part of the record and you may proceed.

TESTIMONY OF MARGARET KOHN, ESQ., NATIONAL WOMEN'S LAW CENTER; NANCY MATTOX, DISABILITY RIGHTS AND EDUCATION FUND, AND MORRIS KINSEY, NAACP STATE OF MISSISSIPPI EDUCATION COMMITTEE

Ms. **Kohn**. Thank you.

Good morning, my name is Margaret Kohn. I am an attorney with the National Women's Law Center.

Thank you very much for inviting me to testify before your subcommittee today. I am here on behalf of 15 organizations. All of these organizations share a common interest and goal. They are working to end discrimination on the basis of sex in educational programs.

All are convinced that the Federal Government and the Department of Education in particular, must conduct an effective enforcement program to insure that federally assisted programs do not discriminate on the basis of race, sex, national origin, or handicap.

We have been monitoring the civil rights enforcement efforts of the Department for many years. Since January 1981, when the Reagan administration took hold of the reins, we have observed several disturbing trends and practices which seriously impede effective enforcement in a qualitative manner.

These practices interfere with the enforcement efforts under all three statutes; title IX, title VI, and section 504.

They reflect dramatic changes in approach from previous administrations. Changes which reduce the chances that beneficiaries of each of these statutes will be protected.

As a member of this panel, my testimony will provide an overview of the shortcomings we have all observed within OCR. That we all experience the same types of problems underscores their widespread nature and the need for corrective action throughout the OCR operation.

My colleagues on the panel will expand and elaborate, based on their extensive experience seeking enforcement of title VI and section 504 and with the regional OCR offices in Atlanta, Ga., and Dallas, Tex.

First, let me emphasize that we think the need for an effective and sincere enforcement effort is as great as ever. Invidious discrimination is far more widespread than any of us would like to believe.

Let me give you some examples of what is going on today around the country.

In Louisville, Miss., since desegregation in 1969-70 school year, all five principal vacancies were filled with white males. The Department of Education found, and I quote, that "Qualified black assistant principals were excluded from consideration in each instance."

At Converse College, a woman's scholarship was rescinded when she became pregnant.

Also in Louisville, Miss., the district assigns high school students to homerooms, study halls, and assemblies on an entirely sex-segregated basis. Girls in one room, boys in another.

In Brownwood, Tex., the school district mislabeled Hispanic youngsters and incorrectly assigned them to special education classes. Hispanic students with limited English-speaking ability were not tested in Spanish, and Hispanic parents were not afforded procedural due process in connection with the assignment or placement of their children.

Serious and destructive discrimination still persists at an alarming level. And therefore, the need for thorough and exacting work by the Department of Education has not diminished.

Let me point out that the Office of Civil Rights has some capable and dedicated employees. On occasion, the work product of these individuals shines through, demonstrating that good performance is possible.

In our view, it is the absence of strong leadership at the top that permits the complacency that results in the disarray we so often observe. It is the leadership's lack of commitment to Federal enforcement of the civil rights laws that leads the agency to tolerate sloppiness, delay, poor management, and imprecision as the norm.

The problems I am going to describe in the regions do not occur in a vacuum. They are part of an overall agenda for the Department, as Mr. Rauh said, one that is intended to depart from civil rights principles accepted on a bipartisan basis by a series of past administrations, both Republican and Democratic.

Secretary Bell and his legal advisers have systematically worked to narrow the scope of the civil rights laws since they came into office.

Let me give you just a few examples. In the summer of 1981, Secretary Bell took steps to change the title IX regulations by withdrawing coverage of employment, abruptly reversing the position of the agency, for the past 9 years.

Those regulations were subsequently upheld by the U.S. Supreme Court.

Secretary Bell sought to restrict his Department's civil rights authority when Federal funding was delivered in the form of guaranteed student loans.

At the beginning of this month, ignoring the advice of his Assistant Secretary for Civil Rights, Secretary Bell intentionally decided not to appeal a district court decision, which severely circumscribes the authority of his Department to investigate civil rights complaints in the eastern district of Virginia. The name of that case is the *University of Richmond* v. *Bell.*

The Secretary has also proposed rulemaking to eliminate written assurances of compliance with civil rights law as a precondition for the receipt of Federal assistance from the Department of Education.

And finally, but equally importantly, Secretary Bell has pushed to require that Government and private parties alleging discrimination prove a discriminatory purpose in order to prevail on an allegation of discrimination in violation of any of these statutes.

In other words, to require proof of intent to discriminate.

These are cutbacks and reversals of the most serious nature. All are likely to restrict civil rights enforcement under all three statutes because the three laws are so similar in their structure and language.

The message conveyed by these actions is clear. In our view, the Secretary is telling his civil rights staff to hold back and to back off.

With this as a backdrop, let me explore several specific problems within the regions, which are all interrelated with and support the policy-level cutbacks that are being supported and put forth by the Secretary. It is all part of the same pattern and plan.

First, the Department, and OCR in particular, applies the wrong legal standards. It is not uncommon to read letters of finding from OCR which articulate legal standards which are the reverse of those required by the statute and regulations.

There appears to be no control to insure that such errors are identified and corrected, nor to prevent repeated application of the wrong standard.

I have given several examples in the materials. Let me focus on one in which the Office for Civil Rights did not find a violation because they claimed there was an isolated incident and not a pattern of discrimination.

The statute prohibits incidents as well as patterns of discrimination. Also in the same case, they stated that there had to be a showing of discriminatory purpose in violation of title IX. But the Department of Education has never announced a formal policy to require proof of intent in title IX cases, and no such requirement has been established by the courts in Texas, where this complaint arose.

By applying the wrong standard, the finding by the office was a finding of compliance, instead of a finding of noncompliance. The application of the wrong standard led to the wrong outcome.

In another example of the standards problem, and here I echo what Mr. Rauh has said, also, the Department is failing to apply its own vocational education guidelines that it itself developed when it handles a vocational education institution review or complaint.

The guidelines were developed pursuant to the 1977 *Adams* v. *Bell* court order and they provide guidance both to the Department staff and to recipients on what ought to be done to insure compliance.

However, in two recent region VI compliance reviews of admission practices in vocational institutions, the guidelines were not even mentioned.

The second problem area is that the Department accepts inferior work and has no meaningful quality control program. The failure to demand quality work, in-depth investigations and a thorough review of data collected as well as letters of finding in which the conclusions are well supported by data is part of the overall plan to reduce effective Federal enforcement through the administrative process.

Shallow investigations and sloppy work leads to fewer findings of violation and far less change. The quality and depth of investigations, as evidenced in letters of finding, varies excessively, both within regions and from region to region.

For example, compare the letter of finding for the Medical College of Georgia and for the University of South Florida College of Medicine compliance reviews. Both are from region IV in Atlanta, reviewing for sex discrimination in recruitment, admissions, and financial aid.

The Georgia letter provides no numerical figures on enrollment or applications by sex, no explanation of what data was considered, or how conclusions were reached.

The 2¼ page letter is so conclusory that one can only assume the review was superficial. In contrast, the six-page South Florida letter has significantly better data and provides far more information on the school's practices, as well as a basis for some of the conclusions.

We are not demanding more from the agency than can be reasonably expected. Two recent letters of finding issued by the Atlanta office within 1 month of each other in this year demonstrate that one investigator did a good job, while the other provided no support whatever for the finding of no violation.

Although OCR has a mechanism entitled the "Quality Assurance Program," it clearly does not work. One very important reason that it fails is because three categories of cases are excluded entirely from its review process.

Each is an area which requires in-depth investigation and the collection and review of substantial data. Discipline discrimination, law reviews and intercollegiate athletic investigations. These are very important reviews and OCR has a considerable number of them.

We would expect the agency to be very interested in assuring those investigations were handled well if there were a sincere commitment to enforcement. The exclusion of these cases confirms our belief that the Department leadership is more than content with the erratic performance and poor quality evident in regional work.

The third area, and I know my colleagues on the panel will share more information with you about this, is that the Department is increasingly accepting an inadequate remedial action plan as an indication that the recipient is in compliance with the law.

The increase in the number of these cases since January 1981 has been tremendous. These quick, superficial corrective action promises enable OCR to close their cases, but often do not change the underlying discrimination.

One of the most outrageous examples of this practice is a letter of finding issued to the University of Nevada at Reno on an intercollegiate athletic program complaint. One of several areas showing inequity was access to coaching and the Department, in its letter, concluded, and I quote, "Women athletes are denied coaching of an equivalent nature and availability."

That is a violation of the statute, of the regulations, and is inconsistent with the policies that the Department has issued in that area. However, the regional staff required absolutely no remedy for that deficiency.

In March of 1982, along with others, I met with Deputy Assistant Secretary of Education for Civil Rights, Joan Standlee, to protest this and to urge that this portion of the letter be withdrawn and significant changes be required.

As of July 1982, no such steps had been taken. We also recommended that changes be made to address the deficiencies that were of a systemic nature that this situation illustrated so well, that there was no mechanism to review major letters from the regions, either before or after they were issued. No review was done by the national office.

In July, Ms. Standlee informed me that no systemic changes to address this issue were needed.

We are unsatisfied with the handling of this situation. If the regions are out of control, they need to be reined in. Instead, we learn that senior Department officials choose to give the regions more and more authority, more discretion, and less supervision.

Another example of inadequate corrective action that OCR accepted as insufficient so that it could issue a finding of compliance also occurred this year in Monmouth County Vocational School District in New Jersey.

In the interest of time, I will not describe this example in detail.

The fourth area is the failure to monitor compliance after a letter of finding is issued. Since January of 1981, the Office for Civil Rights has issued an ever-increasing volume of letters of finding stating that the recipient institution is in compliance with the pertinent statute, but only because it has agreed to take corrective action steps.

Many of these corrective action steps, all too many of them, will be taken in months or, indeed, in years after the case is closed and the investigation has been completed.

We doubt that OCR returns to each of these recipients to determine whether the promised changes have been implemented. Especially when the compliance of large numbers of recipients is contingent upon future actions. OCR must not be permitted to make a finding of compliance and then fail to return to insure that the corrective steps have been completed.

In conclusion, I have outlined four of the most common generic problems civil rights advocacy groups have found. Acceptance of inferior work and lack of quality control, application of the wrong legal standards, inadequate remedial action accepted as compliance, and failure to monitor compliance after the LOF is issued.

The examples cited are replicated over and over and over in other letters of finding issued by OCR. These are not the exceptional cases.

The agency, in our view, has a poor record. We know it could do a much better job if the leadership of the Department supported this work and communicated their commitment to their staff and to the public with words, and more importantly, with actions.

We are convinced that the main reason that the Department operates this way and the way it has been operating is because it is exactly what the administration wants.

That is a very sad commentary.

I thank you and I would be happy, of course, to answer any questions, either now or after the other panelists.

[The statement of Ms. Kohn follows:]

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TESTIMONY

OF

MARGARET KOHN

NATIONAL WOMEN'S LAW CENTER

on behalf

OF

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS
AMERICAN ASSOCIATION OF UNIVERSITY WOMEN
FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN
GIRLS CLUBS OF AMERICA, INC.
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
NATIONAL ASSOCIATION FOR GIRLS AND WOMEN IN SPORTS
NATIONAL EDUCATION ASSOCIATION
NATIONAL STUDENT EDUCATION FUND
OFFICE OF WOMEN IN HIGHER EDUCATION, AMERICAN COUNCIL ON EDUCATION
PROJECT ON EQUAL EDUCATION RIGHTS OF THE NOW LEGAL DEFENSE AND EDUCATION FUND
SOCIOLOGISTS FOR WOMEN IN SOCIETY
UNITED STATES STUDENT ASSOCIATION
WIDER OPPORTUNITIES FOR WOMEN
WOMEN'S EQUITY ACTION LEAGUE
WOMEN'S LEGAL DEFENSE FUND

BEFORE THE SUBCOMMITTEE ON CIVIL AND
CONSTITUTIONAL RIGHTS
OF THE
HOUSE JUDICIARY COMMITTEE

on

ADMINISTRATIVE ENFORCEMENT OF
CIVIL RIGHTS LAWS BY
THE DEPARTMENT OF EDUCATION

September 30, 1982

FORMERLY THE WOMEN'S RIGHTS PROJECT OF THE CENTER FOR LAW AND SOCIAL POLICY

Good morning. My name is Margaret Kohn, I am an attorney at the National Women's Law Center. Thank you for inviting me to testify before your Subcommittee today. I am here on behalf of fifteen organizations:

American Association of University Professors
American Association of University Women
Federation of Organizations for Professional Women
Girls Clubs of America, Inc.
NAACP Legal Defense and Educational Fund, Inc.
National Association for Girls and Women in Sports
National Education Association
National Student Education Fund
Office of Women in Higher Education, American Council on Education
Project on Equal Education Rights of the NOW Legal Defense and Education Fund
Sociologists for Women in Society
United States Student Association
Wider Opportunities for Women
Women's Equity Action League
Women's Legal Defense Fund

All of these organizations share a common interest and goal. They are working to end discrimination on the basis of sex in educational programs. All are convinced that the federal government and the Department of Education, in particular, must conduct an effective enforcement program to ensure that federally assisted programs do not discriminate on the basis of sex, race, national origin or handicap. We have been monitoring the civil rights enforcement efforts of the Department for many years, through the experiences of the members of organizations who have filed complaints with the Office for Civil Rights (OCR), by reviewing Letters of Finding in compliance reviews, and at the national policy making level.

Since January 1981, when the Reagan Administration took hold of the reins, we have observed several disturbing trends and practices which seriously impede effective enforcement in a qualitative manner. These practices interfere with the enforcement efforts under all three statutes, Title IX, Title VI, and §504. They reflect dramatic changes in approach from previous administrations -- changes which reduce the chances that the beneficiaries of each of these statutes will be protected and provided the educational opportunities to which they are entitled.

As a member of this panel my testimony will provide an overview of the shortcomings we have all observed within OCR. That we all experience the same types of problems underscores their widespread nature and the need for corrective action throughout the OCR operation. My colleagues on the panel will expand and elaborate based upon their extensive experience seeking enforcement of Title VI and §504 and with the regional OCR offices in Atlanta, Georgia (Region IV) and Dallas, Texas (Region VI).

First, let me emphasize that we think the need for an effective and sincere enforcement effort is as great as ever. Invidious discrimination is far more widespread than any of us would like to believe. I have several examples that support this conclusion all too well:

- In Louisville, Mississippi, since desegregation in the 1969-70 school year, all five principal vacancies were filled by white males. "Qualified black assistant principals were excluded from consideration in each instance."[1] The District lacked selection criteria, did not accept written applications for the positions and neither posted nor advertised the job openings.
- At Converse College a woman's scholarship was rescinded when she became pregnant.[2]
- In Louisville, Mississippi, the district assigned high school age students at two schools to homerooms and study halls by sex and conducted assemblies for students on a sex segregated basis.[3]
- In Brownwood, Texas, the school district mislabelled Hispanic youngsters and incorrectly assigned them to special education classes. Hispanic students with limited speaking ability in English were not tested in Spanish, and Hispanic parents were not afforded procedural due process in connection with the assignments or placement of their

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[1] OCR LOF Louisville Separate School District, Louisville, Missisippi, #04-80-1337, September (?) 1981, p. 9, Region IV.

[2] OCR LOF Converse College, Spartansburg, South Carolina, #04-81-2073, January 6, 1982, Region IV.

[3] OCR LOF Louisville Separate School District, supra, p. 16.

children.[4]

Serious and destructive discrimination still persists at an alarming level for a nation which promises equality in the 1980s. The need for thorough and exacting work by OCR has not diminished.

The Office for Civil Rights has some capable and dedicated employees. On occasion the work product of these individuals shines through, demonstrating that good performance is possible.[5] In our view it is the absence of strong leadership at the top that permits the complacency that results in the disarray we so often observe. It is the leadership's lack of commitment to federal enforcement of the civil rights laws that leads the agency to tolerate sloppiness, delay, poor management, and imprecision as the norm rather than as an unusual exception.

The problems that I will describe today do not occur in a vacuum. They are part of an overall agenda for the Department -- one intended to depart from civil rights principles accepted on a bi-partisan basis by a series of past adminstrations, both Republican and Democratic. Secretary Bell and his legal advisors have systematically worked to narrow the scope of the civil rights laws since first assuming office.

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[4] OCR LOF Brownwood Independent School District, Texas, #06-80-1075, November 5, 1980, Region VI.

[5] Examples of thorough and well reasoned Letters of Finding with the attached Statement of Findings include those issued to Louisville Separate School District, Louisville, Mississippi, September 1981, #04-80-1337; Bessemer City Board of Education, Bessemer, Alabama, February 13, 1981, #04-80-5020; Humboldt County School District, Winnemucca, Nevada, August 21, 1980, #09-78-0155, Region IX; University of California, Davis, June 19, 1981, #09-80-2128, Region IX.

- During the summer of 1981 Secretary Bell took steps to change the Title IX regulations by withdrawing coverage of employment, abruptly reversing the position of his agency for the past nine years.[6]
- Secretary Bell sought to restrict his department's civil rights authority when federal funding was delivered in the form of Guaranteed Student Loans (GSLs).[7]
- At the beginning of September 1982, ignoring the advice of his Assistant Secretary for Civil Rights[8] Secretary Bell intentionally decided not to appeal a District Court decision which severely circumscribes the authority of his Department to investigate civil rights complaints in the Eastern District of Virginia. The case is University of Richmond v. Bell, No. 81-0406 (E.D. Va. July 8, 1982) Warriner, J..
- Secretary Bell prepared proposed notices of rule-making to eliminate a written assurance of compli-

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[6] The Supreme Court subsequently upheld the validity of the Title IX employment regulations in North Haven Board of Education v. Bell, 102 S.Ct. 1912 (1982).

[7] The House Education and Labor Subcommittee on Postsecondary Education held hearings on the Department's proposed changes in GSL's as federal funding for civil rights accountability purposes on May 13, 1982.

[8] A copy of Mr. Singleton's memo of August 19, 1982 to Secretary Bell is attached to this testimony as Exhibit A.

ance with civil rights laws as a precondition for receipt of federal assistance from the Department of Education.

- Secretary Bell has pushed to require that the government and private parties prove a discriminatory purpose in order to prevail on an allegation of discrimination in violation of Title IX, Title VI and §504, *i.e.*, require proof of intent to discriminate.

These are cutbacks and reversals of the most serious nature. All are likely to restrict civil rights enforcement under all three statutes, because the three laws are so similar in structure and language. The message conveyed by these actions is clear. The Secretary is telling his civil rights staff to hold back, to back off, and to lie low.

With this as a back drop, let me explore several problem areas within the regions, which are interrelated with the cutbacks supported by the Secretary.

1. *Application of the Wrong Legal Standards*.

It is not uncommon to read Letters of Finding from OCR which articulate legal standards which are the reverse of those required by the statute and regulations. There appears to be no control to insure that such errors are identified and corrected, nor to prevent repeated application of the wrong standard.

For example, in an August 1981 Letter of Finding, the Simms Independent School District in Texas was found in compliance with Title IX even though the investigation did uncover sex discrimination in the distribution of athletic awards.[9] The decision was based on two legal conclusions that are patently wrong.

First, OCR stated the practice

> "... was an isolated incident and not part of a pattern to deny extra curricular benefits to female students on the basis of sex."

Neither the Title IX statute, nor its regulations prohibit only patterns of discriminatory behavior. Single acts are also prohibited.

Second, OCR stated that

> "There are no records or other evidence to substantiate that the district's departure from the practice of awarding letter jackets in the student's junior year *was for a sexually discriminatory purpose in violation of Title IX*." (emphasis supplied).

The Department of Education has never announced a formal policy to require proof of intent in Title IX cases. No such requirement has been established by the courts in Texas, either.[10] By applying this standard, OCR used a much more burdensome standard of proof than was permissible. In this case, the OCR rationale for its conclusion that the district was in compliance was legally flawed. Therefore, application of the wrong standard led to the wrong outcome. A finding of violation was necessary, but was never made.

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[9] OCR Letter of Finding, Simms Independent School District, Simms, Texas, #06-79-1520, August 31, 1981, Region VI.

[10] The issue of intent has been considered by many courts. *See e.g.*, *Lau v. Nichols*, 414 U.S. 563 (1974); *NAACP v. Medical Center*, 657 F.2d 1322 (3d Cir. 1981) (*en banc*); *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir. 1981) *cert. denied*, 102 S.Ct. 981 (1981). The U.S. Supreme Court will consider the issue again on the Title VI context this term in *Guardians Association v. Civil Service Commission*, 633 F.2d 232 (2d Cir. 1980) *cert. granted*, 102 S.Ct. 997 (1982).

Another manifestation of the standards problem is the failure to apply Vocational Education Guidelines[11] developed by the Department when reviewing vocational institutions. These guidelines were developed pursuant to the 1977 Order in the Adams v. Bell case. They clearly outline the Department's position and the criteria it will use to assess recipient compliance with Title VI, Title IX and §504. However, in two recent Region VI compliance reviews of admissions practices for Title VI and/or Title IX compliance at vocational institutions, the guidelines were not even mentioned.[12]

2. Acceptance of Inferior Work and Lack of Meaningful Quality Control.

The failure to demand quality work, indepth investigations, thorough analysis of data collected and Letters of Finding in which the conclusions are well supported by data is part of the overall plan to reduce effective federal enforcement through the administrative process. Shallow investigations and or sloppy work leads to fewer findings of violations and far less change. The regional offices do not hold their staff to a standard of performance that could and should be met.

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[11] 34 CFR 100 Appendix B Guidelines for Eliminating Discrimination and Demand of Services on the Basis of Race, Color, National Origin, Sex and Handicap in Vocational Education Programs.

[12] OCR LOF Southwest Louisiana Vocational Technical School, Crowley, Louisiana, August 3, 1982, #06-82-6006, Region VI (Title IX and Title VI) and OCR LOF Foothills Vocational Technical School, Searcy, Arkansas, June 17, 1982, #06-82-6005, Region VI (Title VI).

The quality and depth of investigations, as evidenced by the Letters of Finding, varies excessively both within regions and from region to region. The very same compliance review or complaint which covers the same areas of concern, in similar kinds of institutions, under the same statutes result in Letters of Finding as different as night and day. One is shallow, conclusory and contains inadequate numerical or other data supporting the conclusions. The other contains a thorough review of facts which support the legal conclusions reached.

For example, compare the Letters of Finding for the Medical College of Georgia and for the Univeristy of South Florida College of Medicine compliance reviews. Both are from Region IV and both reviewed medical and/or dental schools for sex discrimination (Title IX violations) in recruitment, admissions and financial aid. The Georgia review letter provides no numerical figures on enrollment or applications by sex, no explanation of what data was considered, nor how conclusions were reached.13/ The 2 1/4 page letter is so conclusory that one can only assume the review was superficial. In contrast, the six page South Florida letter was significantly better in providing far more information on the school's practices and some of the underlying data that formed the basis of the conclusions.14/

13/ OCR LOF Medical College of Georgia, Augusta, Georgia, February 12, 1981, #04-81-6003, Region IV.

14/ OCR LOF University of Southern Florida, Tampa, Florida, October 23, 1981, #04-81-6006, Region IV.

We are not demanding more from the agency than can reasonably be expected. Two recent Letters of Finding, issued by the Atlanta office within a month of one another in the first quarter of the 1982 calendar year, on the same issue -- racially isolated and disproportionate classes -- demonstrate that one investigator did a good job while the other provided no support whatever for the finding of no violation. The letter to Lexington County School District #1, Lexington, South Carolina[15] disposes of the issue in one, brief conclusory paragraph, while the one to Clinton City Schools in North Carolina[16] devotes seven pages and provides a thorough and comprehensive analysis. Both letters were issued by the Atlanta Regional Office, one in Feburary 1982 and the other in March 1982.

Although OCR has a mechanism entitled the quality assurance program, it clearly does not work. One very important reason that it fails is because three categories of cases are excluded entirely from its review process. Each is an area which requires an indepth investigation and the collection and review of substantial data -- discipline discrimination, Lau Reviews (compliance reviews on language services to non and limited English speaking students) and intercollegiate athletic investigations. These are very important reviews and OCR has a considerable number of these cases. We would expect OCR to be very interested in assuring those investigations were handled well, if there were a sincere commitment to enforcement. The exclusion of these cases confirms our belief that Department leadership is more than content with the erratic performance and poor quality evident in regional work.

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[15] OCR LOF Lexington County School District #1, Lexington, South Carolina, #04-81-1251, February 19, 1982, Region IV.

[16] OCR LOF Clinton City Schools, Clinton City, North Carolina, #04-80-1234, March 30, 1982, Region IV. Statement of Findings, pp. 24-31.

3. Inadequate Remedial Action is Accepted As Compliance by OCR.

Since 1981 there has been a dramatic increase in the number of cases in which OCR accepts an indequate remedial plan which fails to assure the discrimination will be ended and the effects of past discrimination remedied in return for a finding of compliance. These often superficial corrective action promises enable OCR to get a quick case closure -- with little more than a cosmetic powder to hide the underlying discriminatory practices which remain unchanged. While the agency lists these cases as ones in which corrective action has been achieved, often only the tip of the iceberg has been melted down, and nothing more.

One of the most outrageous examples of this practice is the LOF issued to the University of Nevada at Reno on an intercollegiate athletic program complaint. OCR found numerous deficiencies and violations of Title IX and its regulations.17/ One area showing inequity was access to coaching.18/ OCR found that "... women athletes are denied coaching of an equivalent nature and availability." However, OCR's Region IX staff determined that no

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17/ OCR LOF and statement of findings, University of Nevada, Reno, January 11, 1982, #09-80-2082, Region IX.

18/ Id., Statement of Findings, pp. 8-12.

remedy was needed. The LOF states that "... UNR has agreed to review this program area in spring 1982 and to correct any disparities if inequities are found to exist. OCR will review UNR's determination in the fall of 1982."[19] In plain English that amounts to no corrective action.

In March, 1982, along with others, I met with Deputy Assistant Secretary of Education for Civil Rights, Joan Standlee, to urge that this portion of the letter be withdrawn and significant changes be required. As of July 1982 no such steps had been taken. We had also recommended in our March meeting changes to address the systemic OCR deficiency, so well illustrated by this example, that there is no mechanism to review major letters from the regions, either before or after they are issued. However, in July Ms. Standlee informed me that no systemic changes to address this issue were needed. We remain unsatisfied with the handling of this situation. If the regions are out of control, they need to be reined in. Instead, we learn that senior Department officials choose to give the regions more and more authority, more discretion and less supervision. Although OCR has a "quality assurance program", sex discrimination in intercollegiate athletic programs is specifically excluded from the quality assurance effort. Thus, the internal agency mechanism that might otherwise have uncovered this problem bypasses this kind of investigation entirely.

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[19] *Id.*, p. 12.

Another example of inadequate corrective action that OCR accepted as sufficient so that it could issue a finding of compliance occurred this year in Monmouth County Vocational School District in New Jersey.[20] There one of eleven vocational campuses enrolled only male students and had had exclusively male enrollment for the preceding three years, even though the district policies appear to allow women to enroll. This would appear to be a violation of the Department of Education's Vocational Education Guidelines[21], but the only action OCR required of the District was that they make a special effort "to reach female students during their recruitment presentations" in the school's feeder districts.[22] The letter offers no justification for such little corrective action. We think additional intensive recruitment of women, the addition of other programs at the school which will attract female students, or the reallocation or clustering of programs and courses at various locations should also have been required. All of these options are suggested by the Vocational Education Guidelines §IV-I. OCR's demand was entirely inadequate and is unlikely to integrate the school.

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[20] OCR LOF Monmouth County Vocational School District, Marlboro, New Jersey, June 25, 1982, Region II.

[21] 34 C.F.R. §100 Appendix B: Guidelines for Eliminating Discrimination and Denial of Services on the Basis of Race, Color, National Origin, Sex, and Handicap in Vocational Education Programs, §IV-H.

[22] OCR LOF Monmouth County Vocational School District, supra n. 20, p. 3.

4. Failure to Monitor Compliance After the LOF Is Issued.

Since January 1981, OCR has issued an ever increasing volume of Letters of Finding informing the recipient institution that it is in compliance with the pertinent statute because it has developed an acceptable corrective action plan. Often such plans involve actions that will be taken in the future, over a period of months, or several years.[23] We doubt that OCR returns to each of those recipients to determine whether the promised changes have been implemented. Especially when the compliance of large numbers of recipients is contingent upon future actions, OCR must not be permitted to make a finding of compliance and fail to return to assure the corrective steps have been completed.

Conclusion

I have outlined four of the most common generic problems civil rights advocacy groups have found -- acceptance of inferior work and lack of quality control, application of the wrong legal standards, inadequate remedial action accepted as compliance and failure to monitor compliance after the LOF is issued. The examples cited are replicated over and over in the Letters of Finding issued by OCR. They are not the exceptions. The agency has a poor record. We know it could do a much better job if the leadership of the Department supported this work and communicated their commitment to their staff and to the public with actions and with words. We are convinced that the main reason that the Department operates the way it does is because that is exactly what this Administration wants.

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[23] See, e.g., OCR LOF University of California at Davis, June 19, 1981, #09-80-2128, Region IX (submit report October 15, 1981 and grievance procedures January 15, 1982); OCR LOF #09-81-6012, University, Inglewood, California, August 12, 1981, Region IX (submit report January 15, 1982); OCR LOF University of Nevada at Reno; January 11, 1981, Region IX (5 years to correct athletic scholarship inequities); OCR LOF University of Illinois at Urbana-Champaign, March 1982, Region V (report due at close of 1982-83 academic year) Overall Finding, p. 3; OCR LOF University of Bridgeport, Connecticut, August 1981, Region I, (renovations to be completed January 1982, recruiting funds substantially equivalent during academic year 1981-82, review of budgets by October 15, 1981); OCR LOF Kansas State University, Manhattan, Kansas, January 29, 1982, #s 07780041 and 07780042, Region VII (athletic scholarship aid equity expected by 1983-84; games and practice time corrections to be completed in 1982-83; (recruitment budget still has huge disparity in 1983-84) Overall Finding, pp. 29-30.

I am happy to answer questions now or after the other panelists have given their testimony.

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

PURPOSE: INFORMATION

AUG 19 1982

TO : The Secretary

FROM: Harry M. Singleton
Acting Assistant Secretary
for Civil Rights, 245-7680

SUBJECT: Appeal of University of Richmond v. Bell, C.A. 81-0406-R
(E.D. Va. July 8, 1982)

ISSUE

OCR recommendation that an appeal be taken from the permanent injunction entered in University of Richmond v. Bell, No. 81-0406 (E.D.Va. July 8, 1982).

ACTION FORCING EVENT

To preserve the Department's right to argue any issue on appeal, the Department of Justice must file a notice of appeal by September 7, 1982. I am told that DOJ had requested OGC to inform them of the Department's intent by August 6, 1982. Normally, it is OGC's responsibility to coordinate the Department's response. To my knowledge, OGC has taken no action on the question. Therefore, I am raising the issue here so that immediate action may be taken to preserve our right to appeal from the Richmond decision.

BACKGROUND

Summary of Decision

The Office for Civil Rights received a number of complaints alleging sex discrimination in athletics at the University of Richmond. OCR commenced a routine investigation under Title IX. 2/ The University refused to allow the investigation because no Federal funds are earmarked for athletics at the University. The University, however, receives substantial amounts of National Direct Student Loan money, and other student aid that is used to fund the University's athletic department. When OCR persisted in its requests for information, the University sued.

On July 8, 1982, the district court hearing the case ruled in favor of the University. The court held that the Department does not have jurisdiction to investigate alleged sex discrimination under Title IX in intercollegiate athletics where no Federal funds are specifically earmarked for athletics. The court also issued a broad injunction barring OCR investigations absent a prior showing that the program to be investigated receives direct Federal aid. While OCR could interpret this injunction narrowly as applying only to Title IX actions, the language of the court's order, on its face, enjoins OCR in cases involving discrimination on the basis of race and handicap as well.

1/ A notice of appeal does not include a statement of a litigant's position or specific grounds for appeal. A briefing schedule is established after a notice of appeal is filed.

2/ Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq.

In reaching its broad investigative ban, the court reversed several of the most fundamental principles under which OCR has operated. The court found that: (1) the "athletics program" is the "program or activity" under Title IX; (2) student financial aid does not constitute Federal financial assistance to the University; (3) even if student financial aid were Federal aid to the University, it is not Federal aid to the "athletics program;" (4) OCR does not have authority to investigate whether discrimination in athletics caused discrimination in (or "infected") other programs of the University; and (5) OCR cannot now investigate to determine whether it in fact has jurisdiction over athletics at the University. As a result, the court ordered that (6) OCR must not investigate any institution in the Eastern District of Virginia before showing that the program to be investigated directly receives Federal financial assistance.

The impact of the court's opinion is sweeping and profound. The opinion is automatically applicable in a large portion of Virginia, and will be invoked by institutions across the country seeking to inhibit the Department's exercise of its law enforcement obligations. If universally accepted, the opinion would (1) halt all protection against discrimination in curricular and extracurricular athletics at all educational levels; (2) nullify all civil rights responsibilities deriving from the broadest forms of aid to education (including, it would appear, impact aid to school districts as well as campus-based student aid in colleges and universities); (3) allow recipients to insulate pockets of discrimination by the way they structure their applications for assistance; (4) preclude OCR from adequately investigating discrimination in a student aid office where the student aid office is acting on the instructions of the athletics department; (5) preclude investigations in other cases where discrimination originating in one part of a school causes discrimination in another part; (6) preclude OCR even from gathering information about the structure and funding pattern of a recipient; and (7) require OCR to be ready to make a factual presentation to a court before it makes initial contact with a recipient. In short, the opinion reaches well beyond the legal question of jurisdiction over intercollegiate athletics and would seek to intrude the district court into the day-to-day workings of OCR.

The Richmond decision must be appealed for several reasons. The central facts of the case contradict the court's conclusion that the athletic program at the University of Richmond does not receive Federal assistance. The court's legal reasoning contradicts the weight of the case law and the traditional position of this Department and the Department of Justice on the jurisdictional reach of student financial aid. Moreover, the court turned specific decisions based on the facts of one case into an overly broad injunction affecting virtually every complaint OCR receives and every compliance review OCR may wish to conduct in the eastern half of Virginia.

B. District court holdings

1. The court held that the "athletics program" is the "program or activity" at issue.

The University argued that its "athletic department is a separate program." In writing the Government's briefs, the Department of Justice avoided the "program or activity" issue as much as possible, knowing that the position it contemplated on this issue would not be approved by ED's Office of the General Counsel. The Governmet offered no definition of "program or activity" whatsoever. The Government made only two brief references to the meaning of this phrase. The government's opening brief said only that "the athletic department of the university is an appropriate subject for a Title IX investigation by ED." The Government's reply brief relied again on the use of student aid money and said that "the Court need not decide whether the University or the athletic department is the appropriate program or activity under Title IX for purposes of deciding this case."

The result was a vacuum which the court filled with an erroneous view of the Government's position. Based on letters from Dewey Dodds (OCR Director, Region III), the court ascribed to OCR an "institutional" or "unified entity" approach, which equates "program" with "recipient" in all cases. I have never advocated or employed such a theory and, furthermore, Title IX jurisdiction over athletics is not dependent on such an approach. With little discussion, 3/ the court defined the program at issue as the "athletics program," consisting of merely the athletic department of the University.4/

The Federal Government has never disbursed money earmarked for school athletics. OCR's athletics regulations and guidelines are based on the understanding that athletics is not a separate "program or activity" but rather is part of a more inclusive education program. The regulations have thus been implemented as covering athletics so long as the larger program *of which athletics is a part* receives Federal financial assistance. The *Richmond* court's conclusion specifically rejects this view of the law. OCR's *view, however*, has more recently been upheld by the Court of Appeals for the Third Circuit in *Grove City* v. *Bell*, Nos. 80-2383, 802384 (3rd Cir. August 12, 1982). In *Grove City*, the

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3/ That Judge Warriner considered no other alternative short of the "institutional" or "unified entity" approach is clear in the statement of the issue in the first paragraph of the opinion.

> At issue is whether the ED is authorized to investigate and regulate the athletic program of a private university where the athletic program itself receives no direct Federal financial assistance.

Slip, at 1.

4/ At various points, the court referred to "athletics," "intercollegiate athletics," and "the athletic department," as if they were synonyms. Differentiating among the three terms would have no impact on *Richmond* or most other cases.

Court of Appeals for the Third Circuit held that, in a functionally "integrated" college receiving Pell grants (such as Grove City College), those Pell grants confer Title IX jurisdiction over the College as a single "program." 5/

1. The court held that student financial aid is not aid to the institution and that, even if it were aid to the institution, it is not aid received by the athletics program.

Having defined athletics as the program in question, the court focused on the question of whether that program received Federal financial assistance. The court termed the athletic department's receipt of student aid funds "indirect receipt," and said that such "indirect" aid is not "received" by a college in the sense meant by Title IX.

The court recognized that the athletic program receives income from the general university fund, a substantial portion of which is derived from Federal student assistance funds. The court also noted that intercollegiate athletes receive scholarships through the student aid office that processes Federal student aid. The court concluded, however, that the funds, while substantial in nature, did not constitute Federal financial assistance to either the athletic department specifically, or the University as a whole. In reaching this conclusion, the court dismissed the Government's reliance on *Bob Jones University* v. *Johnson*, *Grove City College* v. *Harris*, and *Haffer* v. *Temple University*, as "misplaced." Slip op. at 11. 6/

5/ The appellate decision in *Grove City* considered and expressly rejected the district court opinion in *University of Richmond* v. *Bell*.

6/ In *Bob Jones University* v. *Johnson*, 296 F. Supp. 597 (D., S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975), the court held that veteran's benefits disbursed to students were "Federal financial assistance" sufficient to subject the educational program of the University to Title VI's prohibition against discrimination. The district court treated the meaning of program or activity as follows: "[A]ll that is necessary for Title VI purposes is a showing that the infusion of federal money . . . assists the educational program of the approved school." 396 F. Supp. at 603 n. 22. In *Grove City* v. *Harris*, 500 F. Supp. 253 (W.D. Pa. 1980), affirmed recently *sub nom.* *Grove City College* v. *Bell*, Nos. 80-2383, 80-2384 (3rd Cir. 1982), the district court held that students' participation in Federal assistance programs constitutes Federal assistance to the college. In *Haffer* v. *Temple University*, 524 F. Supp. 531 (E.D. Pa. 1981), *appeal pending*, the court held that there was a clear Congressional intent to cover athletics, and that, because Federal funds not earmarked for athletics were so easily transferable to athletics, athletics "received" Federal financial assistance.

Further, the court acknowledged that the University received Federal funds in the form of work study assistance and that work-study students are employed in the University's athletics department. The court again concluded, however, that these funds did not constitute Federal financial assistance to the athletics program.

The court essentially recognized that the athletics program benefits from this indirect receipt, but found that this did not mean that the athletics program receives Federal financial assistance as contemplated in Title IX.

The court made clear (1) its general doubt that Title IX contemplated ever equating an indirect benefit with the direct receipt of Federal financial assistance, and (2) its specific conclusion that student financial aid does not constitute direct Federal financial assistance *to the University or to the athletic department*.

This opinion is in conflict with the Third Circuit's subsequent decision in *Grove City*, which held that student financial aid is Federal financial assistance to the institution and its parts. The appellate decision in *Grove City* relies, in part, on the Supreme Court's recent conclusion in *North Haven Board of Education* v. *Bell*, 102 S. Ct. 1912 (1982). The Supreme Court ruled that, by conforming to a standard incorporating specific language of the Fifth Circuit opinion in *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F.2d 1068, 1078 (5th Cir. 1969), the Department's Title IX regulations met the program specific limitation of Title IX. 7/

3. The court held that OCR could not investigate in order to see whether discrimination in athletics "infected" other programs.

In *Richmond*, the Government argued that it should be allowed to investigate to see whether -- even if athletics is not a "program or activity receiving Federal financial assistance" -- discrimination in athletics causes discrimination in other university "programs" that are federally funded. (For example, the generally-phrased student complaints may implicate discrimination in the student aid office and in the office making work-study assignments.)

7/ The language from the *Taylor County* decision, which is quoted in the comments to the Title IX regulations, provides:

> [A]n education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it receives or benefits from such assistance . . . . 40 Fed. Reg. 24128 (1975).

Slip op. at 27 (footnote omitted).

The court rejected the claim, noting that there was no allegation that discrimination in athletics infected programs that the court would view as federally funded (slip, at 15). 8/ The court then went on to reject the infection approach in its entirety (slip, at 15-16), and enjoined the Department from investigating the "infectious" source of discrimination if that source is outside the federally funded "program" (slip, at 20-21).

4. The court held that OCR could not now investigate to determine whether it in fact had jurisdiction over athletics at the University of Richmond.

The Government argued that it should be allowed to investigate to determine whether athletics at the University of Richmond is in fact a "program or activity receiving Federal financial assistance." The court rejected this claim as "double-talk and sophistry" since the regional office had demonstrated its belief that it had jurisdiction over athletics per se (slip, at 17). 9/ This holding, in itself, is not of general concern, since it is a reaction to OCR's handling of this particular investigation, and because the holding comes after the pre-trial discovery process by which the Department had an opportunity to make its preliminary investigation into jurisdictional questions. The court's order (listed here as the fifth holding), however, forecloses a preliminary investigation into jurisdictional matters in all cases if OCR can make no showing of jurisdiction at the outset.

5. The court enjoined all investigations in the judicial district, absent a prior showing of a program's direct receipt of Federal funds.

Judge Warriner enjoined all further activities with respect to the University of Richmond's athletic program. Moreover, the court enjoined the Department from

> investigating any other programs or activities at an educational institution within the jurisdiction of this Court absent a prior showing that such said [sic] program or activity is the recipient of direct Federal financial assistance.

Slip, Judgment, at 1; see also, slip, at 20-21. The court clearly intended its order to apply to each institution of elementary, secondary, or post-secondary education in the judicial district, and did not limit its holding to Title IX cases.

8/ Although the point was not emphasized in our district court briefs, an appellate brief could discuss our interest in examining possible discrimination in the student aid office that was caused by athletics policies, and in investigating that possible discrimination to its source.

9 The court also said that, in contrast to the exemplary inclusion of a limited section on investigations in the Title VI regulations, the Title IX regulations do not authorize investigations (slip, at 18-19). This is factually inaccurate. The Title VI regulation cited with approval by the court (34 C.F.R. 100.7(c)), is in fact incorporated by reference in the Title IX regulations, at 34 C.F.R. 106.71.

The terms of the order give added impact to holdings three and four by foreclosing investigations of an "infector" program that is not directly funded, and by foreclosing preliminary investigations by which OCR informs itself about the structure and funding of a recipient. This creates a "Catch-22" for OCR. Before OCR can investigate, it must show direct funding, but it cannot show direct funding without investigating the administrative and budgetary structure of the recipient.

OPTIONS AND ANALYSIS

OPTION I: Appeal the case.

Discussion/Assessment:

A. Substantive Concerns

To obtain a reversal of the district court's decision in Richmond, it is necessary to persuade the Fourth Circuit (1) that Federal student financial aid is aid "received" by the institution under Title IX, and (2) either that student aid is received by each part of the institution that draws from the general university fund, 10/ or that athletics is part of the same education program that receives the Federal student aid funds.

Persuading the Fourth Circuit to reverse the district court only to the extent of saying that Federal student aid is received by the institution (but not its parts) would leave the district court's opinion essentially intact. Similarly, pursuading the Fourth Circuit to reverse only the district court's narrow definition of "program" (without also reversing on whether student aid is aid "received" by the University) would also leave the district court's opinion intact.

In short, an effective reversal will occur only if the "athletics program" is said to receive Federal student aid or if athletics is part of a larger program that receives the Federal student aid funds. 11/ A successful appeal in the "program or activity" and the "receipt of student aid" areas would also dispense with the problem of the overly broad language of the injunction.

10/ It is stipulated in the Richmond case that the athletics department is funded from the general university fund that receives the tuition payments.

11/ The University of Richmond is typical of many colleges whose athletic program we seek to investigate. Thus, there are no factual anomalies (other than the existence of the adverse lower court decision) making this case inappropriate for pursuing OCR policies.

B. Strategic Concerns

An appeal is justified to ensure that every effort is taken to maintain OCR's position on these very fundamental questions. However, definite Department policy in these areas should be established prior to taking the appeal.

The handling of the Richmond case, thus far, exemplifies the danger of entering into a case only to later contest with OGC the substantive content of the briefs. The Government's briefs were, in my view, compromised by internal bickering with OGC on the legal and policy issues raised by the case. Although Judge Warriner might not have been receptive to alternative views on "program or activity," the fact remains that the Richmond case was the first time the Government has had an opportunity to be heard in court on the issue and, in part because of the Government's awkward silence, 12/ the court ascribed to OCR a view that OCR has long rejected. OCR cannot afford to enter into another case, particularly at the Circuit Court level, in which, because of unresolved policy questions, it fails to respond to the other party's position with cogent legal analysis.

Thus, my recommendation to appeal is premised upon the assumption that we, within the Department, can agree upon a coherent, persuasive position which would -- if it prevailed on appeal -- reverse the district court's holding. One way of developing the necessary policy position is to limit our inter-Departmental review of the program or activity question to those aspects of the issue which relate to the Richmond appeal and reserve other aspects of the issue for the upcoming regulation review meetings. For example, in its recent Grove City decision, the Third Circuit Court of Appeals limited its analysis to the nature of the "program" receiving nonearmarked funds. The Court thus put aside the definition of "program" where specifically earmarked funds are the funds being "received." The Department eventually must articulate policy covering both situations. In an appellate brief in the Richmond case, however, we could limit ourselves to the "program or activity" issue in the context of nonearmarked funds.

An alternative within this option is to appeal some issues and not appeal others. 13/ While it is possible to choose among the holdings of the court

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12/ The generally wavering and inconsistent nature of the Government's stance was noted by the district court in its opinion.

13/ The Department could: appeal the "receipt" holdings; appeal the overbreadth of the order; not appeal the "program or activity" holding; but state that the Government does not agree with the "program or activity" holding and will seek clarification and nationwide consistency through rulemaking.

and to appeal only those on which the Department is closer to consensus, as a practical matter the key holdings are closely interwoven. 14/ Appealing some holdings while remaining silent on holdings involving unresolved policy areas — such as the definition of "program or activity" — would be awkward at best. While we can encourage the appellate court to rule in our favor without addressing the "program or activity" issue, there is no guarantee that it would do so. We attempted this "selective" approach to the issues — unsuccessfully — at the district court level.

The appeal, if taken, would be to the Court of Appeals for the Fourth Circuit. While it is impossible to predict what the Fourth Circuit will do with *Richmond*, judicial activity in the rest of the country gives some indication that the district court's extremely narrow definitions of "program or activity" and what it means to receive Federal funds is against the trend of other courts. For example, the Court of Appeals for the Third Circuit recently issued its opinion in *Grove City College* v. *Bell*. The opinion fully supports OCR's position and specifically rejected the district court's *Richmond* decision. 15/ In addition, *Haffer* v. *Temple University*, *supra*, presents the same substantive issues as the *Richmond* case and is presently pending appeal in the Third Circuit, on similar issues. In *Haffer*, the district court rendered a decision in keeping with OCR's present interpretations of "program or activity" and of "receipt" of Federal financial assistance. The key threat to succeeding on the appeal is posed by the absence of a unified, coherent Government position.

OPTION II: Take no appeal.

Discussion/Assessment:

If universally accepted, the district court decision in *Richmond* would create sweeping changes under each of the statutes implemented by OCR. Indeed, implementing the court's approach would remove civil rights jurisdiction over the numerous cases in which the discrimination alleged is not within the smallest organizational unit for which Federal aid is earmarked.

14/ While this suggests the possibility of appealing either the "receipt" holding or the "program or activity" holding, the strength of the appeal of the "receipt" holding is affected by whether or not the "program or activity" holding is appealed. To some extent, these two issues stand or fall together. However, this is one of the questions to answer in the process of writing our brief on appeal.

15/ Since the *Grove City* and *Richmond* decisions are from different judicial circuits, the *Grove City* decision did not overrule the *Richmond* decision.

The effect would cut across each statute and most types of cases handled by OCR. The very sweeping implications of the Richmond decision, however, are the product of the combination of (1) the court's holding that the athletics department is the statutory "program or activity," and (2) the court's two-pronged holding that student financial aid is not aid to the institution and that, even if it were aid to the institution, it is not aid received by the athletics program. The first of the two prongs eliminates jurisdiction over cases dependent on student financial aid even where discrimination is alleged in the award of student financial aid or in admissions. 16/ By logical extension, it would eliminate jurisdiction over the many elementary and secondary cases dependent on the receipt of impact aid.

In combination, the court's two key holdings mean that the absence of funds earmarked for athletics is jurisdictionally fatal. Virtually all cases involving alleged discrimination in athletics would be foreclosed, as would a substantial percentage of other cases. If we accept the idea that each part of a recipient is divorced from each other part, and the idea that the broadest and most common forms of aid are jurisdictionally irrelevant, few of the Title VI, Title IX, or Section 504 complaints now handled by OCR would remain within OCR's jurisdiction. The single area of greatest impact would be Title IX athletics.

OCR's athletics regulations and guidelines 17/ are based on the understanding that athletics is not a separate "program or activity" but rather is part of a more inclusive general education program. The regulations have thus been implemented as covering athletics so long as the larger program of which athletics is a part receives Federal financial assistance. OCR's policy also acknowledges that athletics is routinely funded out of student aid receipts. Complaints are received and processed, in large numbers, pursuant to this policy.

Of all open Title IX complaints as of June 30, 1982, 20.9% (59 out of 282) dealt with situations virtually identical to that of the Richmond case. That is, they involve athletics, they involve institutions of postsecondary education, they involve no money directly earmarked for athletics, and it is likely that virtually all of the institutions participate in one or more Federal

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16/ The second of the two prongs, without the first -- that is, the position that student aid is aid "received" by the institution, but not aid "received" by the athletics department -- would retain jurisdiction over discrimination in student aid or admissions, but would remove jurisdiction over virtually all other cases dependent on nonearmarked funds.

17/ Pursuant to a statutory amendment to Title IX requiring Title IX regulations covering intercollegiate athletics, OCR has promulgated Title IX regulations dealing with athletics and guidelines dealing with intercollegiate athletics.

student financial aid programs. Of all Title IX complaints closed between January 20, 1981 and June 30, 1982, 18.9% (113 of 597) are in this category. Of Title IX complaints closed during that period resulting in some benefit to the complainant, 29.4% (84 of 286) are in this category. Figures on elementary and secondary athletics cases would increase these percentages.

RECOMMENDATION

I recommend that the Department appeal the Richmond decision because it is so overly broad as to interfer with the everyday enforcement activities of OCR. Further, the position taken by the court on a number of substantive issues contradicts the weight of existing case law, disputes the validity of the Department's regulations, and jeopardizes the ability of OCR to effectively perform its statutory duties.

ATTACHMENTS:

Tab A: District Court opinion in Richmond case.
Tab B: Circuit Court opinion in Grove City case.
Tab C: List of some of the Colleges and Universities located within the Eastern District of Virginia, as well as a list of some of the Counties and Cities that are located within the Eastern District of Virginia.

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Mr. **Edwards**. Thank you very much, we appreciate your testimony and we will have questions when all three of the panelists have completed their statements.

The next witness to speak will be Ms. Nancy Mattox of the Disability Rights and Education Fund.

Ms. **Mattox**. Thank you, Mr. Chairman.

Mr. Chairman, and members of the subcommittee, I am Nancy Mattox and I am here today to present testimony on behalf of the Disability Rights, Education and Defense Fund of Berkeley, Calif.

Mr. **Edwards**. Speak up, please.

Ms. **Mattox**. OK. My apologies for the lateness of my testimony to this committee. I am sure you are aware that this has been a very busy week for disability issues.

DREDF is a national organization committed through its educational community organizing and research activity to the advancement of independence for disabled people. We serve a national network of over 4,000 disabled people, parents of disabled children, and their advocates, by providing information and support on disability rights.

For the past 3 years, our organization held contracts from the U.S. Department of Education, Office for Civil Rights, to conduct training programs across the country on section 504 implementation and enforcement.

It was our charge to provide necessary followup to each trainee to remedy problems of noncompliance in their areas. I came to DREDF from a program in North Carolina which conducted such a training program for the northeastern part of the country and in the South.

As a technical assistance person for that organization, I became very familiar with the Office for Civil Rights, in both Dallas and Atlanta.

In preparing for this hearing, we contacted personnel within the Office for Civil Rights in Atlanta and in Dallas, Chicago, and Washington. Our sources assured us that the caseload presently being carried by staff investigators in these regions was down significantly from months ago.

In Chicago, which may be one of the busiest regions in the country, the caseload is down to about 18 cases per investigator and in Denver, it is down perhaps to less than one case per investigator.

There are a number of reasons why we think this caseload has fallen off. We would like to think it is because there are a lot of smart disabled people out there who are working with recipients on their own getting some sort of voluntary compliance and who do not need Federal intervention.

We have concerns that the administration's plans to change both Public Law 94-142, as reported in today's paper, and section 504, may be frightening people off into thinking that some of the protections they have now will not exist in a few months.

However, we are also concerned by reports from advocates in some States that the Office for Civil Rights may have lost credibility in assuring that civil rights complaints are properly investigated and compliance enforced. Thus, disabled people now choose options other than the OCR complaint process to resolve problem areas.

Our displeasure with the Office for Civil Rights is not something new which began with this administration. For several years, our concerns have centered around recurring issues involving excessive violations of the Adams order timetables, insufficient documentation of findings and individual complaints and inconsistent findings in complaints involving similar issues.

However, since 1981, the Office for Civil Rights has begun at least two changes which we believe soften OCR's assurances that compliance will be vigorously enforced. We refer specifically to the establishment of hold categories and directives from OCR Washington to regional offices that when recipients agree to take corrective action to remedy discriminatory acts, letters of finding should not state that the recipient has violated civil rights laws.

The first thing I want to talk about in detail is the establishment of hold categories. The Office for Civil Rights began a process in about September of 1981 to reorganize the manner in which compliance reviews and complaint investigations were conducted.

One of the first things they did was develop a whole series of hold categories. Of the six hold categories created, five deal with section 504. Some of them include employment, catherization, psychotherapy, discipline, extended school programs, and auxiliary aids in post-secondary institutions.

We believe these actions are in direct contradiction to existing 504 mandates and interagency guidelines The internal review process is occuring without adequate notice and opportunity to comment by the class of disabled people protected by 504, and it undermines the coordinating authority and responsibility of the Department of Justice, pursuant to Executive Order 12250 and the 504 interagency guidelines.

In employment, prior to August 6, 1982, five circuit courts held that 504 did not convey protections from discrimination in employment unless the purpose of the Federal financial assistance was to provide employment opportunities.

The Office for Civil Rights continued to hold from investigation all employment complaints, including those complaints filed in regions not covered by such decisions and those complaints for the purpose of the FFA may well have been to provide employment.

On August 9, Department of Justice Assistant Attorney General Brad Reynolds, in response to a letter of complaint filed by our organization sent a memo to then Assistant Secretary for Civil Rights, Clarence Thomas, requesting that the hold be lifted from complaints in regions not covered by a restrictive interpretation and that all employment complaints be processed where the purpose of the assistance was to provide employment opportunities.

There is no word on what happened after this memo. On May 24, Acting Assistant Secretary Harry Singleton lifted the hold from title IX employment complaints, following the *North Haven* decision by the Supreme Court.

He also reported that an analysis of *North Haven's* applicability to section 504 would be forthcoming. No such analysis has yet appeared.

Disability is eager to find out whether, indeed, 504 will be extended to employment because very, very recently in August and September, we have had two circuits throw out the decisions made by the previous five circuits and rule that employment discrimination is covered by section 504.

Despite Mr. Reynolds' memo to the Office for Civil Rights and indications that the office would soon reach a decision on 504's applicability to employment, OCR personnel in Dallas, Atlanta, Chicago, and Washington reported to us this week, that the hold has not been lifted from employment complaints or any other restricted areas.

Hold categories for some of the other areas include extended school year programing, catherization, discipline and psychotherapy. All of them very important to children in school.

Presumably, the Department looked to clarify some of these issues in its proposed regulations for Public Law 94-142, published on August 4, proposals which are receiving overwhelming disapproval by disabled people, their advocates, and school districts across the country.

The Department of Education proposed specific regulatory language which would allow disciplinary sanctions to be exercised against disabled children without the opportunity for a hearing, except in those instances where nondisabled children are provided hearings for suspensions or expulsions.

For the remaining three areas, the Department has requested additional public comments to be submitted and to give the Department direction formulating appropriate policies.

I should note here that yesterday Secretary Bell withdrew some of these areas, although discipline was not one. The withdrawal of some of those six areas from the education regulations is only going to throw us into more confusion and leave these issues up to interpretations by the individual regions, which we believe is a problem.

Existing case law in the areas of catherization, psychotherapy, and extended school year program is very clear. A December 3, 1981, memo from Deputy Assistant Secretary Michael Middleton to Mr. Thomas, outlines a whole series of cases which might require the specific related services to be provided by recipients.

Middleton's memo states "law and policy on each of these questions is clear" and recommends that "the hold categories be deleted."

Ten months later, the hold categories are still in place and the Department, rather than providing clarification in its proposed rules, only asks the public for additional guidance during the comment period.

This December 1981 memo to Mr. Thomas conceded that the creation of hold categories had "stifled morale in OCR, and more importantly, impeded the timely processing of a number of complaints."

Although Middleton's instruction to regional OCR directors in December noted that the creation of hold categories did "not mean that case processing activities are to stop," our organization has been told by OCR personnel in Dallas and Atlanta, that the regional offices have in fact ceased processing the majority of cases which might fall under a hold.

The other problem that we have is what Ms. Kohn just referred to, compliance by corrective voluntary action. In October of last year, a memo was sent from the Departmental Division for Litigation, Enforcement, and Policy Service through the Deputy Assistant Secretary for Civil Rights, notifying regional directors that the Office for Civil Rights was implementing a new program to encourage early voluntary compliance settlements with recipients.

LEP's suggested that a "violations-corrected" letter of finding be written after the recipient had submitted a corrective action plan which would find the recipient to be fulfilling its obligations or in compliance upon completion of the remedial steps.

This and subsequent memos from OCR directed investigators to write letters of finding in such a way that when recipients agree to correct discriminatory acts, the LOF should not state that the recipient has violated civil rights laws.

Cases could be closed after the receipt by OCR of plans for compliance.

The problems with this are very obvious. One of the complaints that we are receiving from people in the field is that if the recipient decides not to follow his own voluntary compliance plan, what option does that have for the people that began the complaints to begin with?

Does yet another complaint have to be filed with the Office for Civil Rights on the exact same issues? And specifically, what kind of followup is being done by OCR in the field? Our reports say very, very little.

We have been told that sometime during the month of August, Mr. Singleton has directed the regional offices to return to earlier practices of clearly stating findings of noncompliance and evidence of clear compliance efforts before cases are closed.

We do not have that memo. We have been assured that that action has been taken, and we hope that it has.

We have had a number of complaints over the past years. In the spring of 1981, attorneys from the Texas and Oklahoma Protection and Advocacy Systems and two private advocates filed a joint complaint with the Department of Justice, charging that the Office for Civil Rights in Dallas was not adequately enforcing 504.

The group charged that OCR region VI was negligent in their adherence to Adams order timeframes, that insufficient documentation was being gathered in complaint investigations by a number of field staff, that findings in cases involving similar situations were very dissimilar.

The Department of Justice found in April of 1982 that while charges that OCR was unnecessarily delaying 504 compliance activities, could not be substantiated, the charges of inconsistent findings and inadequate training of field investigators could not be ignored.

The Department of Justice recommended that for the following 6 months, the quality assurance branch of the Planning and Compliance Service specifically monitor all the 504 activities in region VI.

That 6-month review should be ending about now, and we will be monitoring the results.

In reviewing some of the cases that were submitted to this subcommittee over the last 2 years, we have been encouraged by a number of things, frankly.

Some of the investigations have been very good. A school district called the Amite County public schools in Mississippi, had a complaint filed against them, and the LOF showed that appropriate, good statistical data had been gathered on the school's placement procedures, among other things, and all of these things disproportionately had an adverse impact on black students.

The problem still exists, however. While the Atlanta office conducted a good investigation of the Amite County public schools on, among other things, alleged discriminatory treatment of black students, the same office conducted a very poor investigation charging title VI and 504 violations of the school district in Amory, Miss.

The investigator in the Amite County case gathered data to show the total school population by race, compared to the population of special education programs by race. The Amory investigator never cited the racial composition of the district and finds that the school district is in compliance, even though some troubling information is given.

> We find that 94 percent of white students who were placed in special education were placed in specific learning disabilities classes. We find that 27 percent of black students placed in special education programs were placed in specific learning disability classes and the other 73 percent were placed in classes for educable mentally retarded children.

They end their complaint with, "Only black students are placed in educable mentally retarded classroooms," and still the Office for Civil Rights found the school system in compliance.

We have received no indication that OCR has gone back to monitor whether the voluntary steps have yet been taken.

One other area, other than OCR and complaint processing, is OCR's gathering of data collection where disability is concerned.

In June 1982, OCR released to all superintendents of public elementary and secondary schools, their civil rights survey, asking for numbers of children served in their programs by race, sex, and handicapping condition.

A number of statistics are not kept on disabled children. Specifically, no data is requested on the sex, race, or ethnicity of special education students except for five conditions: Mentally retarded, the speech-impaired, the severely emotionally disturbed, and those children with specific learning disabilities.

No information is requested in these areas for children who are hard of hearing, deaf, visually impaired, mobility impaired, blind, et cetera.

We have no idea, why this information is not requested except the problems of mislabeling, particularly of minority children, usually become noticed because of the overuse of the five categories mentioned.

It is also interesting to us that OCR has blocked out one part of the reporting form which would allow disabled children to be counted in the gifted and talented programs.

Is this because OCR does not want children counted in two different categories, both gifted and talented and disabled, or is it because of a perception that disabled children could not qualify for gifted and talented programs?

No information is required for the number of faculty or staff who identify themselves as disabled. Given that subpart (B) of the Department of Education's existing 504 regulations requires recipients to employ and advance in employment qualified handicapped persons, shouldn't these statistics be gathered to monitor compliance?

I have attempted to outline the problems the disability community faces in processing discrimination complaints through the Office for Civil Rights.

The creation of hold categories contrary to intent often slow the timely processing of complaints or held complaints up altogether. The Office for Civil Rights has spoken to the need for suspending hold categories in areas dealing with the provision of services to school-age children.

The practice of OCR in writing letters of finding of compliance——

Mr. **Edwards**. Because of a vote in the House, we will have to recess for about 10 minutes. Sorry.

[Recess.]

Mr. **Edwards**. The subcommittee will come to order and you may proceed.

Ms. **Mattox**. I am going to come to a close here, Mr. Chairman. We have two major concerns, the hold categories, which keep complaints from being processed, and which are not there for a good reason, anyway, and the way that the Office for Civil Rights is writing letters of finding that there is compliance found, and very little followup of the corrective action plans.

We have a series of suggestions for the subcommittee, if you would like to take them under consideration.

Thank you.

[The statement of Ms. Mattox follows:]

STATEMENT OF NANCY MATTOX

Mr. Chairman and Members of the Subcommittee:

I am Nancy Mattox, and am here today to present testimony on behalf of the Disability Rights Education and Defense Fund, Inc. (DREDF) of Berkeley, California. The Disability Rights Education and Defense Fund is a national organization committed through its educational, community organizing, and research activities to the advancement of independence for disabled people. DREDF serves a national network of over 4,000 disabled people, parents of disabled children and their advocates by providing information and support on disability civil rights.

For the past three years, our organization held contracts from the U.S. Department of Education - Office for Civil Rights to conduct training programs for disabled people and their advocates on Section 504 implementation and enforcement, and to provide the necessary follow-up assistance to remedy problems of noncompliance. That work afforded us an opportunity to work closely with the Office for Civil Rights' regional offices and to monitor their investigation and enforcement capabilities.

In preparing for this hearing, we contacted personnel within the Office for Civil Rights in Atlanta, Dallas, Chicago and Washington. Our sources assured us that the caseload presently carried by staff investigators in the regions was down significantly from previous months. We are sure there are any one of a number of reasons for this. We would like to think that, in the area of disability complaints, knowledgeable disabled people are working well with recipients to bring programs into voluntary compliance with Section 504. We believe that the present regulatory review of Public Law 94-142 (the Education for All Handicapped Children Act) and Section 504 has caused concern among disabled people that some of the present protections included in these regulations may be eliminated in the months to come. However, we are also concerned with reports by advocates in some states that the Office for Civil Rights may have lost credibility in insuring that civil rights complaints are properly investigated and compliance enforced, and that disabled people now choose options other than the OCR complaint process to resolve problem areas.

The disabled community's displeasure with the Office for Civil Rights is not a new phenomenon which began with the start of this Administration. For several years, our concerns with OCR have centered around recurring issues involving excessive violations of the Adams Order timetables, insufficient documentation of findings in individual complaints, and inconsistent findings in complaints involving similar issues. However, since 1981, the Office for Civil Rights has instigated several changes in its standard operating procedures which we believe soften OCR's assurances that compliance will be vigorously pursued. We refer specifically to the establishment of "hold categories", and directives from the OCR-Washington to regional offices that, when recipients agree to take corrective action to remedy discriminatory acts, Letters of Finding should not state that the recipient has violated the civil rights laws.

The establishment of hold categories - The Office for Civil Rights issued internal memoranda to Regional Directors restricting pre-letter of finding negotiations on specific areas of Section 504 by Regional OCR investigative officers (September 4, 1981 and October 19, 1981). The 504 areas under restriction include employment, catherization, psychotherapy, discipline, extended school years programs, and auxiliary aids in postsecondary institutions. These actions are in direct contravention of existing 504 mandates and inter-agency guidelines. The internal review process is occurring without adequate notice and opportunity to comment by the class of disabled people protected by Section 504, and it undermines the coordinating authority and responsibility of the Department of Justice pursuant to Executive Order 12250 and the 504 Inter-Agency Guidelines.

- Employment - Prior to August 6, 1982, five Circuit Courts held that 504 did not convey protections from discrimination in employment unless the purpose of the federal financial assistance was to provide employment opportunities. The Office for Civil Rights continued to hold from investigation all employment complaints, including those complaints filed in regions not covered by such decisions and those complaints where the purpose of the federal assistance may well have been to provide employment.

On April 9, 1982, Department of Justice Assistant Attorney General William Bradford Reynolds, in response to a letter of complaint filed by our organization, sent a memo to then-Assistant Secretary for Civil Rights Clarence Thomas requesting that the hold be lifted from those complaints in regions not covered by a restrictive interpretation, and that all employment complaints be processed where the purpose of the assistance was to provide employment opportunities (see Attachment A). On May 24, 1982, Acting Assistant Secretary Harry Singleton lifted the hold from Title IX employment complaints, following the Supreme Court's decision in North Haven Board of Education v. Bell, and reported that an analysis of North Haven's applicability to Section 504 would be forthcoming. No such analysis has yet appeared. Two Circuit Courts recently ruled that Section 504 was intended to convey employment coverage (Jones v. MARTA, 11th. Circuit Court of Appeals, No. 81-7746, August 6, 1982, and LeStrange v. Conrail, 3rd. Circuit Court of Appeals, 501 F. Supp. 964, September 1, 1982). Despite

Mr. Reynolds' memo to the Office for Civil Rights and indications that the Office would reach a decision soon on 504's applicability to employment, personnel with OCR in Dallas, Atlanta, Chicago and Washington reported to us this week that the hold has not been lifted from employment complaints or other restricted areas.

- Other hold categories - Holds still continue in the areas of extended school year programming, catherization, discipline and psychotherapy. Presumably the Department looked to clarify some of these issues in its proposed regulations for Public Law 94-142, published August 4, 1982, proposals which are receiving overwhelming disapproval by disabled people, their advocates and school districts across the country. The Department of Education proposed specific regulatory language which would allow disciplinary sanctions to be exercised against disabled children without the opportunity for a hearing, except in those instances where nondisabled children are provided hearings for suspensions or expulsions. For the remaining three areas, the Department has requested additional public comments be submitted to give the Department direction in formulating appropriate policies.

However, existing case law in the areas of catherization, psychotherapy and extended school year programming clearly points to the school district's responsibility to provide such services if necessary to keep a child in an appropriate placement. A December 3, 1981, memo from Deputy Assistant Secretary Michael Middleton to Thomas outlines a succession of cases which require these specific related services to be provided by the recipients (see page 2 of Attachment B). Middleton's memo states, "Law and policy on each of these questions are clear," and recommends that "this hold category be deleted." Nearly ten months later, the hold categories are still in place and the Department, rather than providing clarification in its new proposed regulations, only asks the public for additional guidance during the comment period.

The Office for Civil Rights has already admitted that existing case law clarifies the issue; why try to change through the deregulatory process what has not been conceded by the courts?

It should noted that Middleton's memo to Thomas also concedes that the creation of hold categories had "stifled morale in OCR and, more importantly, impeded the timely processing of a number of OCR cases." Although Middleton's instructions to Regional OCR Directors in December, 1981, noted that the creation of the hold categories did "not mean that case processing activities are to stop" (see Attachment C), our organization has been told by OCR personnel in Dallas and Atlanta that the regional offices have in fact ceased processing the majority of cases which might fall under a hold.

Compliance by voluntary corrective action. On October 19, 1981, a memo was sent from the Departmental divison for Litigation, Enforcement and Policy Service through the Deputy Assistant Secretary for Civil Rights notifying Regional Directors that the Office for Civil Rights was implementing a program to encourage early voluntary compliance settlements, or pre-LOF settlements, with recipients (see Attachment D). LEPS suggested that a "violations corrected" Letter of Finding be written after the recipient had submitted a corrective plan of action which would find the recipient to be "fulfilling its obligations", or in compliance, upon completion of the remedial steps. This and subsequent memos from OCR directed investigators to write Letters of Finding in such a way that, when recipients agreed to correct discriminatory acts, the "LOF should not state that the recipient has violated the civil rights laws." Cases could be closed after the receipt by OCR of plans for compliance. One of the problems that this creates is: what happens if the recipient indeed does not meet the compliance agreement and the case is closed? Is the complainant required to file another complaint against the recipient? The key, of course, is in follow-up monitoring by the Office for Civil Rights.

In reviewing complaint resolutions which have been rendered by OCR-Region VI since 1981, we were pleased to find some complaints which contained specific timelines for remedying noncompliance (#06812006 - Guidry v. University of Southwestern Louisiana, #06801239 and #06801249 - Garcia v. Regional School for the Deaf, #06811078 - VanOsdol v. Perkins-Tryon School District, etc.). The correspondence indicated that the schools had either already come into compliance by making necessary modifications during the negotiations settlement or voluntarily submitted progress reports to the Office for Civil Rights. However, the material supplied to us by OCR did not contain any follow-up correspondence from OCR to the schools. We contacted Mr. Gerald Garcia, one of the complainants listed above, and Mr. Garcia informed us that he was only contacted once since receiving the letter of settlement to check on the progress being made at the school, but the contact was made by the State Educational Agency, not by the Office for Civil Rights. While there was insufficient time to make contact with a number of former complainants and cannot then say that we have established a pattern for lack of follow-up, we were told this week by OCR personnel in Chicago and Washington, and private attorneys in Austin, that follow-up by the Office for Civil Rights of these settlements is very minimal. A contact with OCR in Chicago told us that follow-up was left up to the conscientiousness of the field investigator or the tenacity of the original complainant. The burden of compliance monitoring may have shifted to the complainants, not to OCR.

We have been told that during the month of August, Mr. Singleton has directed the Regional Offices to return to the earlier practices of clearly stating findings of noncompliance and having evidence of clear compliance efforts before cases are closed. While we have not been able to obtain copies of any such directives at this time, we would hope that the former practice is now in place.

Other concerns - Over the last three years, we have heard a substantial number of general complaints from our network, particularly regarding the operations of the Offices for Civil Rights in Dallas and Atlanta. In the spring of 1981, attorneys from the Texas and Oklahoma Protection and Advocacy Systems and two private advocates filed a joint complaint with the Department of Justice charging that the Office for Civil Rights in Dallas was not adequately enforcing Section 504. This group charged that OCR-Region VI was negligent in their adherence to Adams Order timeframes; that insufficient documentation was being gathered in complaint investigations by a number of field staff; that findings in cases involving similar situations were very dissimilar, etc. The Department of Justice found in April of 1982 that while charges that OCR was unnecessarily delaying 504 compliances activities could not be substantiated, the charges of inconsistent findings and inadequate training of field investigators could not be ignored. The Department of Justice recommended that for the following six months, the Quality Assurance Branch of the Planning and Compliance Service specifically monitor all of the 504 activities of Region VI's Elementary and Secondary Division. That six-months review will be ending the first week of October and our office will monitor those results.

Our office did review many of the cases which were received by the Subcommittee over the last week, and is pleased by some of the things we find. The Office for Civil Rights in Dallas reopened a case involving Coweta Public Schools in Oklahoma, conducted a more thorough investigation, provided sufficient documentation, and clearly stated violations. The Atlanta regional office conducted an apparently thorough and comprehensive investigation of the Amite County Public Schools in Mississippi and collected the appropriate statistical data to show the school's placement procedures, among other things, had a disproportionately adverse impact on Black students.

However, some problems apparently still exist. While the Atlanta office conducted a good investigation of the Amite County Public Schools on, among other things, alleged discriminatory treatment of Black students, the Office conducted a fairly poor investigation charging Title VI and Section 504 violations of a school district in Amory, Mississippi. The investigator in the Amite County case gathered data to show the total school population by race, compared to the population of special programs by race. The Amory investigator never cited the racial composition of the district, and finds the school system in compliance even though some troubling information is given: "We found that 94% of the white students who were placed in a special education program were placed in SLD (specific learning disability). We found that 27% of the black students placed in a special education program were placed in SLD and the other 73% were placed in EMR (educable mentally retarded). Only black students were placed in EMR."

We find that in some of the cases reviewed, Adams Order timetables were still exceeded but this may be caused by the time allowed school districts to develop corrective action agreements with OCR investigators. We also find that timetables are exceeded in almost every case where the Letter of Finding is referred to the Washington Office for Civil Rights for approval. The total number of cases being reviewed by OCR-Washington was not available to us. Overall, these general complaints are very difficult to fully analyse without access to full sets of documents including the original complaint, all communication from OCR to the recipient and from the recipient to OCR, etc.

Before concluding, there is another area of OCR's operation which concerns us - that of data collection. On June 9, 1982, OCR released to all Superintendents of public elementary and secondary schools their civil rights survey asking for numbers of children served in their programs by race, sex and handicapping condition. A number of statistics are not kept on disabled children. Specifically, no data is requested on the sex, race or ethnicity of special education students except for five conditions: educable/ trainable mentally retarded, the speech-impaired, the severely emotionally disturbed, and those children with specific learning disabilities. No information is requested in these areas for children who are hard of hearing, deaf, visually impaired, mobility impaired, health impaired, deaf-blind, etc. We have no idea why this information is not requested, except that problems of mislabelling particularly minority children disabled usually become noticed because of the overuse of these five categories.

It is also interesting to us that OCR has blocked out one part of the reporting form which would allow disabled children to be counted into gifted and talented programs. Is this because special needs children should not be counted twice in the annual child count, or is it because of a perception that disabled children may not qualify, because of their disabilities, for accelerated classrooms?

No information is required for the number of faculty or staff who identify themselves as disabled. Given that Subpart B of the Department of Education's existing 504 regulations requires recipients to "employ and advance in employment qualified handicapped persons," shouldn't these statistics be gathered to monitor compliance?

No data is required for the number of disabled students (by disability) who successfully complete high schools programs and graduate.

The recently-approved data collection instrument asks respondents to note the number of schools with accessible entrances, restrooms, and sciences labs, but requests numbers for children in wheelchairs only. Presumably, asking school districts for such figures is a means of measuring the cost-effectiveness of making schools accessible, but the figure would not take into account children with general mobility impairments.

We wish to raise the issue of data collection because the information collected in the past has often not sought information on the race and sex of disabled people, and on the measures of their success through graduation from high school programs, participating in home economics or industrial arts courses, etc. The new survey instrument appears to be biased and limiting.

o Conclusion - I have attempted to outline the problems the disability community faces in processing discrimination complaints through the Office for Civil Rights. The creation of hold categories, contrary to intent, often slowed the timely processing of complaints or held complaints up altogether. Office for Civil Rights officials have spoken to the need for suspending hold categories in areas dealing with the provision of services to school-age children. The practice of OCR in writing Letters of Finding of compliance when recipients submit voluntary corrective plans somewhat clouds OCR real responsibility to promptly respond to investigations and issue binding requirements. It places the burden unfairly on disabled complainants to monitor the compliance activities of recipients, not on OCR where it belongs.

If recommendations to this Subcommittee for possible areas of action is in order, we would like the pose the following possibilities:

1. That the Subcommittee encourage the Department of Education-Office for Civil Rights to release its analysis of the applicability of the North Haven decision to complaints filed under Subpart B of the 504 regulations - employment being central

to the full integration of disabled people;

2. That the Subcommittee call on Mr. Singleton to remove all hold categories from the area of related services for school age children and develop appropriate guidelines for implementation of the named related services areas;

3. That the Subcommittee support a policy within OCR to write letters of finding stating noncompliance with civil rights laws, to keep complaint files open until the Office has received evidence that the recipient has met the terms of compliance, and that investigators be required to systematically follow-up plans for voluntary compliance;

4. That the Subcommittee request additional information from the OCR central office in Washington pertaining to the number of complaints in review, the average review period for proposed LOFs, the average number of complaints on the case load of investigators in the regions, etc.

Thank you for this opportunity.

U.S. Department of Justice

Civil Rights Division

ATTACHMENT A

Office of the Assistant Attorney General

Washington, D.C. 20530

9 APR 1982

Mr. Clarence Thomas
Assistant Secretary
Office for Civil Rights
United States Department of Education
Washington, D.C. 20202

Dear Mr. ~~Thomas~~ Clarence:

We recently obtained a copy of Deputy Assistant Secretary Michael A. Middleton's December 3, 1981 memorandum to your regional offices concerning the disposition of certain types of cases. We are concerned by the directions provided for the handling of employment complaints filed under section 504 of the Rehabilitation Act of 1973 as amended.

My staff has determined that, for the most part, the effect of this memorandum has been to stop the processing of all employment complaints filed under Subpart B of your 504 regulations, 34 C.F.R. 104.11-.14. We believe that the Office for Civil Rights is correct in refusing to process Subpart B complaints in those states covered by the decisions in the second, fourth and eighth circuits which limit 504 employment coverage. However, we question the propriety of refusing to process Subpart B complaints in those states not covered by the rulings. Therefore, we request that you promptly notify your regional offices whose jurisdiction has not been limited by the circuit court decisions to begin accepting, investigating and, where appropriate, remedying all 504 employment complaints. In states where coverage has been limited, regional offices should be informed that they may process employment complaints where the purpose of the grant is to provide employment or the alleged discrimination might impact on the beneficiary class. Finally, we recommend that in all regions your offices should accept complaints, even if they cannot at this time be investigated, for the purpose of assuring a timely filing date.

If your staff has any questions please have them contact Stewart B. Oneglia, Chief, Coordination and Review Section at 724-2222.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

ATTACHMENT B

3 DEC 1981

TO : Clarence Thomas
Assistant Secretary for
Civil Rights

FROM : Michael A. Middleton
Deputy Assistant Secretary
for Civil Rights

SUBJECT: Hold Categories

As a result of a number of discussions that we have had over the past several weeks regarding hold categories, you have requested my suggestions as to each. In my view, the hold category concept is a good one, but one that has stifled morale in OCR and, more importantly, impeded the timely processing of a number of OCR cases. Since we have demonstrated our ability to resolve the many controversial civil rights issues amicably, and since in recognition of that fact, you have authorized me to proceed with negotiations in cases involving hold category issues, I recommend that the majority of these issues be dropped. The mere existence of hold categories has proved to be a rallying point around which our detractors can accuse us of pulling back on our enforcement efforts. By dropping most of the hold categories, we minimize that argument. By resolving cases involving those issues through voluntary settlements where possible, we continue to enforce these civil rights laws amicably and non-intrusively as Congress intended. Dropping these categories would not in any way interfere with the Secretary's prerogative of closely scrutinizing letters of findings of violations.

My specific recommendations follow:

1. EMPLOYMENT JURISDICTION UNDER TITLE IX AND SECTION 504

Issue: The extent to which Title IX and Section 504 empower the Department to require nondiscriminatory employment policies and practices from recipients of Federal financial assistance. In the past OCR has taken jurisdiction over 1) employment *qua* employment and 2) employment practices which have an adverse impact on student beneficiaries of Federal assistance.

Status: Cases arising under both types of jurisdiction are placed on hold. As of 10/20/81, 124 cases were on hold in this category.

Recommendation: All enforcement activity in Title IX Subpart E cases should remain suspended pending the Supreme Court's decision in *North Haven*. All Title IX Subpart D cases should continue to be investigated consistent with existing policy. We recommend suspending enforcement of Section 504 Subpart B employment cases until the issues involved are resolved. Title IX Subpart E and Section 504 Subpart B cases should, therefore, remain on hold.

2. RELATED SERVICES UNDER SECTION 504

a. Catheterization
b. Psychotherapy

Issue: Whether the requirement that recipients of Federal financial assistance make available to each handicapped child a free appropriate public education, including special education and related aids and services, specifically requires the recipient to make available catheterization and psychotherapy services.

c. Extended School Year

Issue: Whether the recipients must make available a longer school year as a "related service" for those children whose handicap requires additional time in school.

Status: All cases are placed on hold. As of 10/20/81, 49 cases were on hold in the above three categories. Our data on the related services question is not broken down into subcategories of catheterization, psychotherapy and extended school year.

Recommendation: Law and policy on each of these questions are clear. The Department's regulations require the provision of related services. In addition, three Federal courts have held that the provision of catheterization services is required by Section 504: *Tatro* v. *Texas*, 625 F.2d 557 (5th Cir. 1980); *Tokarcik* v. *Forest Hills School District*, No. 80-2844 (3rd Cir. Sept. 8, 1981); and *Hairston* v. *Drosick* 167, 423 F. Supp. 180 (S.D. W.Va. 1976). Courts have also ruled that psychotherapy is required as a related service under Section 504: *Papacoda* v. *Connecticut*, No. H-80-630 (D. Conn. May 22, 1981); *Gary B.* v. *Cronin*, No. 79-C-5383 (E.D. Ill. July 17, 1980); *In the Matter of the "A" Family*, 602 P.2d 157 (S.Ct. Mont. 1979). Finally, all of the courts which have addressed the "extended school year" question have held that the absolute exclusion of educational programming in excess of 180 days is prohibited: *Battle* v. *Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980); *Georgia Assoc. of Retarded Citizens* v. *McDaniel*, No. C78-1950A (N.D. Ga. April 3, 1981); *Anderson* v. *Thompson*, 495 F. Supp. 1256 (E.D. Wis. 1980), aff'd in part, No. 80-2364 (7th Cir. Sept. 8, 1981); and *In the Matter of Scott K*, 92 Misc.2d 681, 400 N.Y.S.2d 289 (Fam. Ct. 1977). Even though the related services question in each of these three areas is being evaluated in the context of the regulations review project, the clarity of our existing regulations and the state of the case law on the subject do not allow us to cease to apply the law in this area until the Department decides to engage in the rulemaking process to change that law where it has the discretion to do so. We, therefore, recommend that this hold category be deleted and that these cases be processed immediately under existing OCR policy. Currently, OCR takes the position that if these services are included in an appropriately developed IEP, a recipient must provide them. If, as a result of the regulations review process, the Department decides to seek revision of those portions of the regulations which are at issue here, enforcement should be suspended, as was done in the Title IX Subpart E employment issue, and the issues placed on hold.

3. ATHLETICS UNDER TITLE IX

Issue: The definition of equal educational opportunity in interscholastic and intercollegiate athletics programs.

Status: All athletics cases irrespective of issue are being held at headquarters, with the exception of intercollegiate athletics LOFs which have proved capable of settlement. As of 10/20/81, 36 athletics cases were on hold.

Recommendation:

a. Intercollegiate Athletics

The present policy is to have all letters of findings which cite a recipient postsecondary athletics program for a violation of Title IX dealt with by headquarters personnel in cooperation with the regions. Each such letter is evaluated for legal sufficiency and the institution is then contacted in an effort to seek voluntary compliance. This procedure has resulted in amicable settlements to date. Given the success of negotiations in this area, we recommend that this hold category be deleted. If the regulations review process results in a Departmental effort to revise the athletics policy, the issues involved may be placed on hold.

b. Interscholastic Athletics

We recommend that Title IX athletics cases arising in the context of elementary and secondary education programs be processed under existing procedures. Because interscholastic athletics is not part of regulations review, there is no pending change in the Department's policy which may justify placing cases in this category on hold.

4. DISCIPLINE UNDER TITLE VI, TITLE IX AND SECTION 504

a. Title VI and Title IX

Issue: Whether a violation of Title VI or IX exists where race or gender is a factor in the administration of discipline or where students are disciplined differently on the basis of race or gender.

Status: All cases which show disparate treatment on the basis of race or gender in the administration of disciplinary sanctions are on hold. As of 10/20/81, three cases were on hold in headquarters.

Recommendation: This substantive area is not included on the regulations review process. Thus, separate policy initiatives must be undertaken to resolve the Secretary's concern here. The Secretary's concern is as I understand it, that discipline cases cannot be made simply on the basis of statistical evidence. Recognizing that education cannot proceed in a tumultuous environment, he wishes to be more certain that disparities in treatment are the result of unlawful discrimination. We recommend that a memorandum be prepared for the Secretary which will define the issue and describe the legal standards applied to cases arising under §§ 100.3(b) and 106.31(b). Should those standards be found inadequate, we will prepare an options memorandum based upon the Secretary's concerns with present standards. Until such time as the Secretary has decided upon a separate legal standard, we recommend that this hold category be deleted, but that the three cases presently held at headquarters be processed at headquarters under the oversight of Joan Standlee. OCR's communication with the Secretary's office and the processing of these three cases should result in clear policy guidance to the regions.

b. Section 504

Issue: Whether a handicapped student may be suspended or expelled without first receiving a hearing on whether the disciplinary infraction was a product of his or her handicapping condition and (2) whether a recipient must take the student's handicapping condition into account in framing a disciplinary sanction.

Status: All cases involving the discipline of handicapped students without the requisite procedural safeguards are on hold.

Recommendation: Because cases arising in this area deal with technical questions of procedural safeguards, they are frequently capable of negotiated settlement through technical assistance. Given the relatively small number of cases in this area and their susceptibility to amicable settlement, we recommend that the cases be processed through existing procedures. Suspension of enforcement in this area is appropriate once the Department decides to change existing policy and regulations which require the application of procedural safeguards under Section 504.

CONCLUSION

Because of the negative effects of the existence of "hold" categories, I recommend that most be dropped. Only where the Department has taken concrete action to change existing regulatory requirements or where our jurisdiction is seriously questioned do I believe that a "hold" status is appropriate. In such cases, all activity should cease. As to the remaining issues, I recommend that OCR process cases as usual. When negotiations fail, draft violation LOFs will be submitted to you through the Early Warning Report for careful scrutiny.

APPROVE 12/7/81

DISAPPROVE ____________________

OTHER ____________________

MEMORANDUM
UNITED STATES DEPARTMENT OF EDUCAT
WASHINGTON, D.C. 20202

ATTACHMENT C

DATE: 3 DEC 1981

Reg. IV

TO : Regional Directors
Office for Civil Rights
Regions I - X

FROM : Michael A. Middleton
Deputy Assistant Secretary
for Civil Rights

SUBJECT: Enforcement Procedures in Hold Category Cases

This memorandum supercedes all previous memoranda relating to regional enforcement activity in "hold category" cases and other cases involving issues under policy review.

The memorandum of understanding between OCR and the Secretary's Office regarding Early Warning procedures for letters of findings of civil rights violations (MOU) identifies six areas of policy reconsideration (see TAB A). These policy areas are commonly referred to as "hold categories." As described in the MOU, these categories are:

1. Employment (Title IX and Section 504);
2. Catheterization (Section 504);
3. Psychotherapy (Section 504);
4. Discipline (Title VI, IX, and Section 504);
5. Extended School Year (Section 504);
6. Athletics (Title IX)

These are the only hold categories within OCR and they do not affect the regional handling of cases. When a substantive issue is designated a "hold category" for OCR enforcement purposes, it means that the issue is one where OCR policy is under reconsideration by the Secretary. During that period of reconsideration, the Secretary will exercise a higher degree of scrutiny to letters of finding of violation in these substantive areas. This does not mean that case processing activities are to stop. Cases within the hold categories are subject to Early Complaint Resolution, investigation, Pre-LOF Settlement and Early Warning Report procedures through the application of policies in effect prior to the time the issue was placed on hold. You need not consult with LEPS prior to engaging in Pre-LOF Settlement negotiations in hold category cases.

As with all cases, if a recipient is unwilling to negotiate, the case should be submitted on the Early Warning Report. Furthermore, if you anticipate being unable to achieve voluntary compliance in any given case, standard LOF clearance procedures should be followed in submitting the case on the Early Warning Report (EWR). Please keep us informed of your progress under these procedures. This is especially necessary for all cases submitted on EWR. The status of negotiations in each case must be stated on the EWR submission. No case may be submitted for the Report unless negotiations have been attempted.

Among the "hold category" cases, there are those that require the immediate cessation of processing. (See Tab B). Those categories of cases are: cases arising under the Title IX dress code regulation which are being held pending the anticipated publication in January 1982 of the final rule deleting the requirement of nondiscrimination in the application of dress codes; Title IX Subpart E cases which should be processed consistent with the July 5, 1979 memorandum (Tab C); and, Section 504 Subpart B cases. I will notify you when it becomes necessary to cease activity in other categories of cases.

Where the law, policy or any other matter which may affect negotiations of a case is not clear in any of the above described categories, you should consult LEPS in accordance with established procedures (see TAB D).

Attachments

Tab A - October 15, 1981 MOU regarding Early Warning procedures

Tab B - December 3, 1981 memorandum on hold category cases

Tab C - July 5, 1979 memorandum on Title IX Subpart E

Tab D - September 29, 1980 memorandum on communication procedures

RIX

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DATE: 19 OCT 1981

ATTACHMENT D

TO : Regional Directors
Office for Civil Rights
Regions I - X

THROUGH: Michael A. Middleton
Deputy Assistant Secretary
for Civil Rights

FROM : Antonio J. Califa
Director for Litigation, Enforcement
and Policy Service

SUBJECT: Interim Direction on Pre-LOF Settlement Procedures

In an effort to improve our performance under the Adams timeframes and to reduce confrontations between OCR and recipients of Federal assistance, we are implementing a program of encouraging settlements in the early stages of our dealings with the recipient. This memorandum outlines interim procedures for achieving pre-LOF settlements. Pre-LOF settlement procedures apply during the investigative stage and, therefore, should not be confused with Early Complaint Resolution which occurs prior to an investigation. A more detailed explanation of OCR policy and procedures regarding pre-LOF settlements is being developed in coordination with similar projects in PCOS and PRAS and will be forwarded to you as soon as possible.

Sometimes emphasis on the letter of findings (LOF) has unnecessarily inhibited our ability to achieve voluntary compliance from postsecondary educational institutions and local school districts. With this memorandum, we are encouraging you to use your best efforts to negotiate with recipients to achieve a settlement of the complaint which is legally sufficient and satisfies the needs of the complainant and the recipient. The Regional Director is responsible for identifying whether any given case or compliance review may be settled through pre-LOF negotiations. The Chief Regional Civil Rights Attorney should serve as counsel to the Regional Director in making such determinations and designing settlements under this procedure.

With the exceptions listed in Appendix A, negotiations may be conducted in complaint investigations and compliance reviews where the law and policy are clear on the issues involved. The list of proscribed settlement categories in Appendix A will be revised periodically as circumstances change. Where the law, policy or any other matter which may affect the negotiation of a case is not clear, you should consult LEPS in accordance with established procedures. (See Appendix B)

Obviously, the pre-LOF settlement approach requires the cooperation of the recipient. The recipient's willingness to negotiate will often depend upon your readiness to communicate anticipated findings and offer practical solutions to the compliance problems discovered during the investigation. Thus, present standards for the conduct of investigations and consultation with supervisors and staff attorneys apply under these procedures.

Negotiations should not begin until after supervisory and attorney review of and concurrence in the substance of the proposed findings and remedies. All proposed settlement agreements must be reviewed by the Chief Regional Civil Rights Attorney and approved by the Regional Director. Thus, where the Regional Director is not present during the negotiations, the recipient must be advised that matters discussed are subject to review for final approval by supervisory personnel in the region and that additional concerns may be raised in subsequent communications with the recipient.

Once the region has received written verification of compliance, a "violations corrected" LOF should be issued to the recipient stating the factual basis for the finding and the remedy for each violation. If the region accepts a specific corrective plan which has yet to be implemented, the language which follows is illustrative of the approach to take in the letter:

> Based upon your written assurance that these remedial actions are being or will be implemented as set forth in [cite to relevant document], we consider [insert recipient's name] to be fulfilling its obligations at this time. Continued compliance is contingent upon implementation of the plan.

The letter should also state that compliance with the agreement will be monitored and diplomatically state the consequences of failure to perform as agreed upon in the negotiated settlement. As always, a "plan to plan" or a plan which has not been formally adopted by the recipient does not qualify a case for closure under this procedure.

The Adams order requires that the recipient receive notice of the Department's findings within 105 days of the filing of the complaint. We request that all submissions to the Early Warning Report include the draft LOF. If you anticipate being unable to achieve voluntary compliance within 105 days, then you should follow standard LOF clearance procedures. Submission of the draft LOF to headquarters need not interrupt the negotiations process. Indeed, we request that you indicate whether or not negotiations are in process with the recipient who is the subject of the LOF and keep us apprised of your progress.

Adoption of the pre-LOF settlement procedures does not change the Adams requirement that complainants be informed prior to reaching a settlement. Paragraph 12 of the Adams order reads in relevant part: "If HEW makes a finding of discrimination, HEW shall seek voluntary compliance through negotiations. Prior to the initiation of negotiations, HEW shall consult with and obtain from the complainant any information which may be needed to fashion an appropriate remedy. During the period of negotiations, HEW also shall keep the complainant advised of the status of the negotiations as they apply to the remedy being sought for the complainant."

We realize that this procedure places even greater responsibility upon the regions to initiate timely and thorough investigations so that pre-LOF settlement may be accomplished within the strictures of the Adams Order. Please keep us informed of your progress under these procedures so that the final memorandum may adequately address the practical concerns arising from the implementation of this interim instruction.

Attachments

Tab A - Areas where Pre-LOF Negotiations cannot be Conducted

Tab B - Memorandum on Regional Headquarters Communication Procedures

Mr. **Edwards**. Those are good suggestions and we will take them very seriously.

Dr. Morris Kinsey represents the NAACP State of Mississippi Education Committee.

You are welcome, Dr. Kinsey. You may proceed.

Mr. **Kinsey**. Good morning, and thank you for the opportunity to present my views, experiences, and recommendations regarding the enforcement of civil rights by the Department of Education.

My name is Morris Kinsey. I wish to apologize, Mr. Chairman, and to members of this committee, if we have caused any inconvenience in the delay in getting materials over to you, as we had to call in to Washington to have our prints and copies made up for you. I do apologize for the delay, if we have caused any inconvenience to you.

I am a native of the Deep South. I was born in Lisbon, La. on March 2, 1940, and attended a segregated public elementary and high school in Lisbon. Upon high school graduation, I attended Laney College in Oakland, Calif., where I received an associate of arts degree in 1965, a bachelors and masters of arts in education from Michigan State University, and a Ph. D. in higher education administration and clinical psychology from Michigan State University in 1972.

Upon completion of my formal education in 1972, I returned to the South and became the first black Ph. D. to teach at Mississippi State University in Starksville, Miss. From 1976 to 1980 I served as dean of admissions at Mary Holmes College in West Point, Miss. Since 1980 I have served as the full-time chairperson of the Mississippi NAACP Education Committee.

I have been primarily involved in fostering and maintaining equal educational opportunities in the delivery of services throughout the State of Mississippi public education system.

My activities have brought me in direct contact with the citizens who, for various reasons, feel that they have been deprived and denied educational opportunities solely because of race and sex.

In that context, I have endeavored to develop a working relationship with the Office for Civil Rights of the U.S. Department of Education and to assist OCR whenever possible to address these problems.

During the past 2 years I have filed 149 individual complaints with OCR on behalf of students, parents, and other taxpayers against various Mississippi public schools. To date, very few of these complaints have been resolved satisfactorily. I would characterize my experience with OCR as being very disappointing and discouraging.

As I understand, OCR is responsible for enforcing title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, and national origin in federally funded programs and activities; title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally funded programs and activities; and section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against handicapped persons in federally funded programs and activities.

OCR is responsible for processing and resolving complaints brought pursuant to these laws and regulations and has the power to terminate or suspend Federal funding of programs and agencies that are not in compliance.

The NAACP has received complaints on top of complaints from parents, students,and black educators year after year regarding the many racially discriminatory practices encountered daily by blacks from white school officials and personnel.

These complaints prompted our organization to conduct its own investigation to confirm much of what we were already aware prior to submitting the individual complaints against 149 school districts in Mississippi.

As a result of continued violations of the civil and constitutional rights of blacks and women, the Mississippi State Office of the NAACP prepared and submitted the complaints to the U.S. Department of Education, Office for Civil Rights, in an effort to end the racial discriminatory practices so abundantly demonstrated.

The complaints I have filed with OCR demonstrate a pattern of conduct, policies, and procedures designed to systematically deny black students and teachers their rights under the Constitution and Federal civil rights laws. These include: Discrimination against black teachers throughout the Mississippi school system, which includes employment, promotion, benefits, retention and assignment; misplacement of students, through biased testing and other devices, into segregated tracking systems designed to isolate black students; misuse of Federal funds provided to Mississippi school districts; and violations of court orders designed to desegregate the public schools.

The patterns and practices used in the Mississippi public school districts are broad, excessive, frequent, consistent, devastating, and most damaging to black students' education and black school personnel Blacks are being denied equal protection, equal access, and equal educational opportunities.

Blacks have suffered a sharp decline in employment since the public schools were ordered to desegregate in 1970, which has serious racial implications and has impacted upon both black school personnel and students alike.

In the 1967-68 school year, 42 percent of all teachers in Mississippi were black, but by the 1978-79 school year it had dropped to 36.6 percent. Over this time period the number of black teachers increased by 851, but there was an increase of 5,001 white teachers.

The discrimination against blacks in employment in the Mississippi schools is achieved through a number of methods and devices. Blacks are discriminated against in employment and job classification and assignment.

The pattern of employing personnel and assigning personnel to schools is done solely by race. Blacks are seldom employed as principals, assistant principals, coaches, assistant coaches, counselors, English, math, science, speech, biology, chemistry, physics, or music teachers, choir directors, or school psychologists. Blacks are seldom employed as department heads, nor do they receive equal salaries and equal length in contracts as their white counterparts.

It is not unusual for a white instructor in vocational education, with less than a college degree to earn more than blacks teaching in the public schools with higher degrees and certifications.

White principals, coaches, and other personnel often receive free housing, free utilities, supplemental pay, longer contracts, better working conditions, fewer responsibilities and larger salaries than blacks or women.

The U.S. Federal courts have ordered the Mississippi public schools to desegregate, employ, and maintain a certain percentage of black personnel at all levels and positions, yet most of the school districts in Mississippi are not in compliance and are defying the court order. Of the 25,000 elementary and secondary teachers in Mississippi, only 7,000 are black.

One way in which blacks are discriminated against in employment is that whites are employed to fill vacancies once held by blacks who are no longer employed due to terminations, resignations, demotions, and retirement. This causes a major imbalance of black personnel to white personnel.

In Grenada County Municipal School District, for example, a complaint was filed in 1980 alleging that the district was in violation of an existing court order. It took 2 years for a letter of finding to be issued by OCR, and even then it did not deal in a substantive way with our major contention: that black teachers leaving their jobs were not being replaced with blacks.

The letter of finding did note a disproportionate number of blacks leaving employment and being replaced with whites, but the only action required of the district was to report in 3 years. No specific goals or timetables were set.

Black students represent over 54 percent of the State's public school enrollment, while white teachers still maintain 75 percent of the classroom teaching positions. There remains a ratio of 4 to 1 in guidance counselors, 5 to 1 employed as principals and assistant principals, over 12 to 1 in coaching and assistant coaching positions, band directors, choir directors, department heads, Federal program coordinators, and vocational education principals. Such discrimination denies blacks professional and nonprofessional positions in schools statewide because of their race. All but seven school districts have white superintendents.

Black teachers have lost their regular teaching positions to white teachers, giving white teachers job security and less exposure to black students, especially slow learners who score low on standardized tests.

Black teachers are assigned to teach in federally funded programs which offer little or no job security, as funds for many of these programs have already been, and continue to be, cut. A school district in Newton County, for example, now has only two black teachers left, one in special education and one in title I.

When Federal fund cutbacks occur, blacks are the first to lose their jobs. The moving of black teachers from their regular teaching positions and employing blacks in mostly federally funded programs is, by design, a racial tool used to isolate, discriminate, and segregate in Mississippi public schools.

The Mississippi public school districts employ title I coordinators, special education coordinators, and directors of Federal programs to administer, monitor, coordinate, and evaluate programs that serve a 90 percent black clientele. Yet 90-percent of the department heads are white. We believe that this confirms that a pattern of racial discrimination in employment and education against blacks in Mississippi is broad and real.

Mississippi utilizes a tracking system, about which I will comment in more depth later in my testimony. Most often black teachers are assigned to teach the remedial or lower level classes that are almost exclusively black, while white teachers are assigned to teach major subjects in the higher levels.

Despite title IX, prohibiting discrimination on sex, sexual discrimination is still evident across the board in employment, treatment, promotions, demotions, fringe benefits, unequal advancement opportunities assignment, contract terms conditions and lengths, working conditions, work load and career opportunities, as well as in athletic programs and facilities, budget personnel, expenditures, and curriculum.

Throughout our investigations into employment and other discrimination in Mississippi schools, we have found these and other patterns and practices of discrimination against blacks in hiring, promotion, retention, and benefits.

We have discovered and filed complaints against many schools utilizing a sophisticated system of discrimination to isolate, segregate, and deny equal educational opportunity to black students in the Mississippi public schools.

Nearly every school district in the State utilizes a three-level tracking system. The districts utilize racially discriminatory standardized tests as criteria to group students and isolate black students in the lowest level, level III. White students are assigned to level I and II classes. Black students are rarely assigned to level I and only a token number are assigned to level II.

Through the use and misuse of standardized tests, raw test scores and placing students through the recommendation of white teachers, all of which are biased towards blacks, districts have maintained segregated classes.

In the case of McComb School District, for example, the California achievement test has been used to track and segregate students into classrooms that are 90 percent black.

The NAACP filed a complaint against this school district alleging violations in employment, hiring, and promotion, school testing used in a discriminatory manner to isolate and misplace black students, as well as other discriminatory policies and practices. An on-site investigation was conducted and OCR issued a finding that several of these allegations were unfounded.

White teachers will recommend, refer, assign, flunk and refuse to teach black students in order to get them placed in lower levels and slow groups, thus freeing themselves of their constitutional obligation to provide equal education. White administrators and teachers often refer black students to black teachers' classes, teachers who are also victims of racism and discrimination.

White administrators, teachers, and staff use title I, special education and other federally funded programs as a dumping ground for blacks and poor children. White teachers in Mississippi with deep-rooted racial prejudices refuse to teach black students who have been labeled slow, retarded, or troublemakers, or blacks who score low on standardized achievement tests.

This process denies blacks equal access and equal educational opportunities. Testing and isolating blacks in low groups causes destruction in that they are labeled, stigmatized, and stagnated, thus causing them to have lower expectations of themselves.

This, in itself, causes a lack of motivation, self-worth, drive, and confidence. This also causes blacks to be less competitive and less productive and has the long-range impact of molding young people who are less likely to succeed in life.

In Starkville, for example, this three-level tracking system is utilized. In level I and level II, almost 100 percent of the students are white. Level I students are tracked into college preparatory classes at the high school level. They receive instruction in algebra, chemistry and physics, for example, while the remedial levels receive instruction in remedial math and other less comprehensive curriculums.

As a result, when black students graduate from high school—if they graduate—they read at the seventh or eighth grade level at best. Statewide each year about 15,000 students drop out of school—of these, 73 percent are black.

There are even school districts in Mississippi that use three sets of grades, one for each group or tracking level, as part of their criteria for student placement. The grades given in the different levels are assigned different values so that a student who is placed in level I receives an A grade of more value than the student who earns an A in level II or III.

There are other ways in which black students are discriminated against in the Mississippi schools. Black students are forced to ride in mechanically unsafe, overcrowded buses. White students are seldom subjected to such unsafe conditions.

Many of the school districts in Mississippi discriminate in the transportation of students as there is overlapping and rerouting of buses to maintain racial and sexual segregation of students. School districts are restricting buses that pick up students in the same attendance zone where a mixture of black and white students reside in order to avoid integration. Yet, when OCR investigates they do not talk to the bus drivers.

For example, in the complaints we filed against schools in Choctaw, Oklaona, Clarksdale, Oktibbeha, and Cohoma Counties, we recommended specific bus drivers for the investigators to speak with. OCR was, however, steered to talk only to certain people by school principals and superintendents.

White students are permitted to jump school zones, even across county lines outside their school districts, in order to attend classes in other schools and avoid integration, which causes a racial imbalance in many school districts as well as being a violation of existing court orders.

In many Mississippi school districts, blacks are excluded from many of the social clubs and organizations. Blacks do not receive financial achievement awards equally and are not elected kings and queens, unless, of course, a white king and queen are selected simultaneously.

Blacks are denied participation in school bands, choirs, and other extracurricular activities. Black students are excluded from holding office in student government due to the criteria used and are seldom chosen valedictorian or salutorian due to selection criteria based on the tracking and grading system I have already discussed.

Black students are also being discriminated against because the schools misuse funds for special education and title I. Although these funds are provided to the State department of education by the U.S. Department of Education and other Federal agencies to provide special personnel, supplies, equipment and space specifically for disadvantaged and handicapped students, such funds earmarked for many Mississippi school districts are being used as general assistance, to meet the needs of students in areas other than special education, title I and other such federally funded programs.

Funds granted especially to meet the needs of those students are shifted to other areas throughout the school district where everyone except the students identified to receive such services and benefits participate.

Black students in Mississippi make up more than 90 percent of the eligible recipients of such services. However, they are being grossly neglected in services, supplies, benefits and treatment.

For example, in Oktibbeha County, special education and title I funds are not being utilized to purchase special texts and hire specialized personnel. Instead, they hire personnel that work only part time in that area.

In some cases, title I funds are being used to supplant district funds. The funds are used, for example, to pay a bookkeeper who keeps the books on the entire district funds, rather than supplementing the salary of that person for title I fund administration.

In addition, boys and girls are still segregated in classroom seating assignments, assemblies, athletic trips and other areas where blacks and whites are grouped together, thus assuring that white girls, especially at the junior high and high school levels, are not seated next to any black boys. This occurred, for an example, in a school in Louisville; also in others.

Black students are victims of malpractice by white school officials and educators. The majority are not proficient in reading, writing, spelling, and mathematics. They suffer these academic skill deficiencies because they are not taught, counseled, cared for, nor encouraged to further their education.

Mr. EDWARDS. Dr. Kinsey, I am going to have to interrupt your excellent testimony for 1 minute. We are going to have to put the rest of your statement in the record. All of the members have read it, but we are starting to run out of time, and we do have some important questions to ask.

I am sorry we got off to a delayed start today. Otherwise we could have gone through the whole testimony, which on all three parts is excellent and very, very helpful to the House Judiciary Committee.

[The statement of Mr. Kinsey follows:]

STATEMENT BY DR. MORRIS KINSEY, PH. D.

Good morning, and thank you for the opportunity to present my views, experiences and recommendations regarding the enforcement of civil rights by the Department of Education.

My name is Dr. Morris Kinsey. I am a native of the deep south. I was born in Lisbon, Louisiana on March 2, 1940 and attended a segregated public elementary and high school in Lisbon. Upon high school graduation, I attended Laney College in Oakland, California, and received an Associate of Arts degree in 1965, a Bachelors and Masters of Arts in Education from Michigan State University and a PHD in Higher Education Administration and Clinical Psychology from Michigan State University in 1972. Upon completion of my formal education in 1972, I returned to the South and became the first black PHD to teach at Mississippi State University in Starksville, Mississippi. From 1976 to 1980, I served as Dean of Admissions at Mary Holmes College in West Point, Mississippi. And, since 1980, I have served as the full-time chairperson of the Mississippi NAACP Education Committee.

I have been primarily involved in fostering and maintaining equal educational opportunities in the delivery of services throughout the State of Mississippi public education system. My activities have brought me in direct contact with the citizens who, for various reasons, feel that they have been deprived and denied educational opportunities solely because of the race and sex. In that context, I have endeavored to develop a working relationship with the Office for Civil Rights (OCR) of the U.S. Department of Education and to assist OCR whenever possible to address these problems.

During the past two years I have filed 149 individual complaints with OCR on behalf of students, parents and other taxpayers against various Mississippi public schools. To date, very few of these complaints have been resolved satisfactorily. I would characterize my experience with OCR as being very disappointing and discouraging.

As I understand, OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color and national origin in federally funded programs and activities, Title IX of the Education Amendments of 1972 which prohibits sex discrimination in federally funded programs and activities, and Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against handicapped persons in federally funded programs and activities. OCR is responsible for processing and resolving complaints brought pursuant to these laws and regulations and has the power to terminate or suspend federal funding of programs and agencies that are not in compliance.

The NAACP has received complaints on top of complaints from parents, students, and black educators year after year regarding the many racially discriminatory practices encountered daily by blacks from white school officials and personnel. These complaints prompted our organization to conduct its own investigation to confirm much of what we were already aware prior to submitting the individual complaints against 149 school districts in Mississippi. As a result of continued violations of the civil and constitutional rights of blacks and women, the Mississippi State Office of the NAACP prepared and submitted the complaints to the U.S. Department of Education, Office for Civil Rights in an effort to end the racial discriminatory practices so abundantly demonstrated.

The complaints I have filed with OCR demonstrate a pattern of conduct, policies and procedures designed to systematically deny black students and teachers their rights under the Constitution and federal civil rights laws.

These include:

Discrimination against black teachers throughout the Mississippi school system which includes employment, promotion, benefits, retention and assignment;

Misplacement of students, through biased testing and other devices, into segregated tracking systems designed to isolate black students;

Misuse of federal funds provided to Mississippi school districts; and

Violations of court orders designed to desegregate the public schools.

The patterns and practices used in the Mississippi public school districts are broad, excessive, frequent, consistent, devastating and most damaging to black student's education and black school personnel. Blacks are being denied equal protection, equal access, and equal educational opportunities.

EMPLOYMENT

Blacks have suffered a sharp decline in employment since the public schools were ordered to desegregate in 1970, which has serious racial implications and has impacted upon both black school personnel and students alike. In the 1967-68 school year, 42 percent of all teachers in Mississippi were black, but by the 1978-79 school year it had dropped to 36.6 percent. Over this period the number of black teachers increased by 851, but there was an increase of 5,001 white teachers.

The discrimination against blacks in employment in the Mississippi schools is achieved through a number of methods and devices. Blacks are discriminated against in employment and job classification and assignment. The pattern of employing personnel and assigning personnel to schools is done solely by race. Blacks are seldom employed as principals, assistant principals, coaches, assistant coaches, counselors, English, math, science, speech, biology, chemistry, physics or music teachers, choir directors, or school psychologists. Blacks are seldom employed as Department heads, nor do they receive equal salaries and equal length in contracts as their white counterparts. It is not unusual for a white instructor in vocational education, for example, with less than a college degree, to earn more than blacks teaching in the public schools with higher degrees and certifications. White principals, coaches and other personnel often receive free housing, free utilities, supplemental pay, longer contracts, better working conditions, fewer responsibilities and larger salaries than blacks or women.

The U.S. Federal Courts have ordered the Mississippi Public Schools to desegregate, employ, and maintain a certain percentage of black personnel at all levels and positions, yet most of the school districts in Mississippi are not in compliance and are defying the court order. Of the 25,000 elementary and secondary teachers in Mississippi, only 7,000 are black.

One way in which blacks are discriminated against in employment is that whites are employed to fill vacancies once held by blacks who are no longer employed due to terminations, resignations, demotions and retirement. This causes a major imbalance of black personnel to white personnel. In Grenada County Municipal School District, for example, a complaint was filed in 1980 alleging that the district was in violation of an existing court order. It took two years for a Letter of Finding to be issued by OCR, and even then it did not deal in a substantive way with our major contention: that black teachers leaving their jobs were not being replaced with blacks. The Letter of Finding did note a disproportionate number of blacks leaving employment and being replaced with whites, but the only action required of the District was to report in 3 years—no specific goals or timetables were set.

Black students represent over 54 percent of the State's public school enrollment, while white teachers still maintain 75 percent of the classroom teaching positions. There remains a ratio of 4 to 1 in guidance counselors, 5 to 1 employed as principals and assistant principals, over 12 to 1 in coaching and assistant coaching positions, band directors, choir directors, department heads, federal program coordinators and vocational education principals. Such discrimination denies blacks professional and non-professional positions in schools state-wide because of their race. All but seven school districts have white superintendents.

Black teachers have lost their regular teaching positions to white teachers, giving white teachers job security and less exposure to black students, especially slow learners who score low on standardized tests. Black teachers are assigned to teach in federally funded programs which offer little or no job security as funds for many of these programs have already been, and continue to be, cut. In Newton County, for example, they now have two black teachers left, one in Special Education and one in Title I. When federal fund cut-backs occur, blacks are the first to lose their jobs. The moving of black teachers from their regular teaching positions and employing blacks in mostly federally funded programs is, by design, a racial tool used to isolate, discriminate and segregate in Mississippi public schools.

The Mississippi public school districts employ Title I Coordinators, Special Education Coordinators, and Directors of Federal Programs to administer, monitor, coordinate, and evaluate programs that serve a 90 percent black clientele. Yet, 90 percent of the department heads are white. We believe that this confirms that a pattern of racial discrimination in employment and education against blacks in Mississippi is broad and real.

Mississippi utilizes a tracking system, about which I will comment in more depth later in my testimony. Most often, black teachers are assigned to teach the remedial or lower level classes that are almost exclusively black, while white teachers are assigned to teach major subjects in the higher levels.

Despite Title IX, prohibiting discrimination based on sex, sexual discrimination is still evident across the board in employment, treatment, promotions, demotions, fringe benefits, unequal advancement opportunities assignment, contract terms and lengths, working conditions, work loan and career opportunities as well as in athletic programs and facilities, budget personnel, expenditures and curriculum.

Throughout our investigations into employment and other discrimination in Mississippi public schools, we have found these and other patterns and practices of discrimination against blacks in hiring, promotion, retention and benefits.

DISCRIMINATION AGAINST STUDENTS

We have discovered, and filed complaints against many schools utilizing, a sophisticated system of discrimination to isolate, segregate and deny equal educational opportunity to black students in the Mississippi public schools.

Nearly every school district in the state utilizes a three-level tracking system. The districts utilize racially discriminatory standardized tests as criteria to group students, and isolate black students in the lowest level, Level III. White students are assigned to Level I and II classes; black students are rarely assigned to level I and only a token number are assigned to Level II.

Through the use and misuse of standardized tests, raw test scores and placing students through the recommendation of white teachers, all of which are biased toward blacks, districts have maintained segregated classes.

In the case of McComb School District, for example, the California Achievement test has been used to track and segregate students into classrooms that are 90 percent black. The NAACP filed a complaint against this school district alleging violations in employment, hiring, and promotion, school testing used in a discriminatory manner to isolate and misplace black students, as well as other discriminatory policies and practices. No on-site investigation was conducted and OCR issued a finding that these allegations were unfounded.

White teachers will recommend, refer, assign, flunk, and refuse to teach black students in order to get them placed in lower levels and slow groups, thus freeing themselves of their constitutional obligation to provide equal education. White administrators and teachers often refer black students to black teachers' classes, teachers who are also victims of racism and discrimination.

White administrators, teachers and staff use Title I, Special Education and other federally funded programs as a dumping group for blacks and poor children. White teachers in Mississippi with deep-rooted racial prejudices refuse to teach black students who have been labeled slow, retarded, or trouble-makers, or blacks who score low on standardized achievement tests. Many white teachers have not been trained in interpersonal relations and find it difficult to instruct black students. So, these students are assigned to the low levels of the tracking system.

This process denies blacks equal access and equal educational opportunities. Testing and isolating blacks in low groups causes destruction, in that they are labeled, stigmatized and stagnated, thus causing them to have lower expectations of themselves. This, in itself, causes a lack of motivation, self-worth, drive and confidence. This also causes blacks to be less competitive and less productive and has the long range impact of molding young people who are less likely to succeed in life.

In Starkville, for example, this three level tracking system is utilized. In Level I and Level II, almost 100 percent of the students are white. Level I students are tracked into college preparatory classes at the high school level. They receive instruction in algebra, chemistry and physics, for example, while the remedial levels receive instruction in remedial math and other less comprehensive curriculums. As a result, when black students graduate from high school—if they graduate—they read at the 7th or 8th grade level at best. Statewide each year about 15,000 students drop out of school. Of these, 73 percent are black.

There are even school districts in Mississippi that use three sets of grades, one for each group or tracking level, as part of their criteria for student placement. The grades given in the different levels are assigned different values so that a student who is placed in level I receives an "A" grade of more value than the student who earns an "A" in Level II or III.

There are other ways in which black students are discriminated against in the Mississippi schools. Black students are forced to ride in mechanically unsafe, overcrowded buses. White students are seldom subjected to such unsafe conditions. Many of the school districts in Mississippi discriminate in the transportation of students as there is over-lapping and rerouting of buses to maintain racial and sexual segregation of students. School districts are restricting buses that pick up students in the same attendance zone where a mixture of black and white students reside, in order to avoid integration. Yet, when OCR investigates, they do not talk to the bus drivers. For example, in the complaints we filed against schools in Choctaw, Oklaona, Clarksdale and Coahoma Counties, we recommended specific bus drivers for the investigators to speak with. OCR was, however, steered to talk only to certain people by school principals.

White students are permitted to jump school zones, even across county lines outside their school districts, in order to attend classes in other schools and avoid integration, which causes a racial imbalance in many school districts as well as being a violation of existing court orders.

In many Mississippi school districts, blacks are excluded from many of the school clubs and organizations. Blacks do not receive financial Achievement Awards and are not elected Kings and Queens—unless, of course, a white King and Queen is selected simultaneously. Blacks are denied participation in school bands, choirs and other extra curricular activities. Black students are excluded from holding office in student government due to the criteria used and are seldom chosen Valedictorian or Salutatorian due to selection criteria based on the tracking and grading system I have already discussed.

Black students are also being discriminated against because the schools misuse funds for Special Education and Title I. Although funds are provided to the State Department of Education by the U.S. Department of Education and other federal agencies to provide special personnel, supplies, equipment and space for disadvantaged and handicapped students, funds earmarked for many Mississippi school districts are being used as general assistance, to meet the needs of students in other than Special Education, Title I and other such federally funded programs. Funds granted especially to meet the needs of those students are shifted to other areas throughout the school district where everyone except the students identified to receive such services and benefits, participate. Black students in Mississippi make up more than 90 percent of the eligible recipients of such services. However, they are being grossly neglected in services, supplies, benefits and treatment. For example, in Oktibbeha County, Special Education funds are not being utilized to purchase special texts and hire specialized personnel. Instead, they hire personnel that never work in that area at all. In some cases Title I funds are being used to supplant district funds. The funds are used, for example, to pay a bookkeeper who keeps the books on the entire district's funds, rather than supplementing the salary of that person for Title I fund administration.

In addition, boys and girls are still segregated in classroom seating assignments, assemblies, athletic trips and other areas where blacks and whites are grouped together, thus assuring that white girls, especially at the junior high and high school level, are not seated next to any black boys. This occurs, for example, at a school in Louisville, among others. Black male teachers are seldom employed to teach at junior and senior high school levels, especially where sex may be discussed in classes and where female students are assigned to participate.

Black students are the victims of malpractice by school officials and educators. The majority are not proficient in reading, writing, spelling and mathematics. They suffer these academic skill deficiencies because they are not taught, counseled, cared for nor encouraged to further their education.

ENFORCEMENT BY OCR

You might wonder how it is that the school districts have been able to avoid enforcement by OCR when such flagrant violations continue. In many cases, OCR simply refuses to investigate. Mr. William H. Thomas, Director of the Atlanta Regional OCR, has refused to investigate 123 complaints filed against Mississippi public schools, although they were submitted nearly a year ago. A year later, black people are still being grossly discriminated against and no attempt at correcting this situation has been made.

The problems have compounded and multiplied, yet OCR has offered no help nor attempted in any way to free blacks of the unfair and unjust treatment they continue to receive due to racial discrimination and segregation practices used against them.

These practices, along with adequate documentation of their existence, have been brought to the attention of OCR by myself in the form of 149 individual complaints. Of the total number, only 26 have received any attention from OCR, five were dismissed based on a determination of no finding and 21 were alleged to have been resolved though no substantial changes have taken place within the school system. This leaves 123 complaints that have yet to be investigated or examined. The majority of these uninvestigated complaints have been on file with OCR for almost a year and all have been filed for more than 120 days.

In numerous instances the 120 day time limit under the *Adams* Order is not complied with by OCR. For example, in the complaints we filed against Lee County, Aberdeen Municipal, Amory, Union County, Meridian Municipal and Lauderdale County School Districts, it took 6 months to a year for Letter of Finding to be issued.

Even where OCR undertakes action in response to our complaint, the process they use in investigating, or not investigating, nearly insures that no, or only minor, violations will be cited. For example, there is often a lengthy delay between OCR's notice to schools of the complaint and any investigation that might take place, allowing, in some cases, 6 months for a school to "cover-up" their violations. In the Stackville Municipal School District and Noxubee School District, for example, the students were segregated into special education classes. By the time OCR came for an on-site investigation, however, the students had been mainstreamed and white students shifted into remedial level classes. After the investigation, they went back to their practice of isolation.

Schools are allowed to avoid being found in non-compliance if they maintain that they do not keep the required records. Now that that word has gotten around, schools routinely tell OCR officials that the records have not been kept, OCR does not push them aggressively, and no finding of non-compliance is issued. They are told to keep the required records in the future. I know that this has occurred in the Choctaw County schools, Union County schools, Lee County schools, and the Okalona Municipal School District.

In other instances, because of inadequate auditing by OCR, misuse of federal funds, as I described earlier, goes undetected.

OCR does not spend sufficient time doing on-site investigations. Often they will visit a district for only two days or less, so they don't have the time to investigate every school in the district, nor do they talk to all the people who might have knowledge of the violations. This occurred in the Choctaw County, Leake County and Jackson Municipal School Districts. They allow themselves to be steered to talk to only the people recommended by the principal, rather than those recommended to them as having specific knowledge of the violations alleged in the complaint. I mentioned earlier those instances where buses are being rerouted but OCR did not even speak to the bus drivers.

In many cases on-site investigations never take place. OCR asks the school district to provide certain information, and it may not even be accurate, but OCR bases its findings on that information. I know of one case, for example, in Oktibbeah, where the information provided to OCR was inaccurate. It took 2½ years of repeated requests to get OCR into that school district.

In other cases, OCR will negotiate with the school district before even conducting an investigation, which allows the school district to avoid having to take all the required actions necessary to correct the many violations which exist in the school district. This negotiation process was utilized in cases involving Choctaw County, Union County, Houston Municipal, Okalona County, Cohoma County and Clarksdale Municipal School Districts. In these cases OCR came out with a Letter of Finding with no, or only minor, violations.

OCR no longer investigates complaints involving employment or student discipline. EEOC is now responsible for employment discrimination, but the time limits imposed on their complaints—180 days—makes it difficult to file a successful complaint. Many times when we file a complaint against a school district, the violations in the area of employment discrimination have taken place over a longer time period than the 180 day time limit for EEOC action. EEOC wants names of people with problems, while we complain often about patterns and practices of employment discrimination affecting an entire school district. People are fearful of having their names used in an individual complaint, but will allow themselves to become involved in a broader discrimination complaint filed by the NAACP where they feel more protected.

Through these investigative, non-investigative, negotiation techniques, conflict of interest, and the lack of commitment by OCR to utilize the powers available to them to suspend federal funds, serious violations of the federal guarantees against discrimination are allowed to continue.

The NAACP does not have investigation and enforcement responsibilities. The function of the Office for Civil Rights is to do its own investigation of complaints. Yet, OCR has sent us pages and pages of questions about some of our complaints that amount to asking us to do the investigation for them.

OCR has failed to follow through with the requests of the NAACP regarding the complaints against the Mississippi public school districts, although several major efforts were made by officials of the Mississippi State Conference of the NAACP to Mr. William H. Thomas, Director of the Office for Civil Rights in Atlanta, through written and telephone communications.

The NAACP discovered the type of discriminatory acts and practices used by the majority of the public school district officials against blacks to be a serious and consistent class pattern prior to filing with OCR to investigate and seek relief. It is the responsibility of the NAACP to see that the many complaints we receive are developed and forwarded to the Atlanta Regional Office of OCR for investigation and response. It is the responsibility of OCR to investigate complaints in a timely and effective manner, as the Congress has funded OCR to do.

The Mississippi public school system is almost as segregated today as it was 20 years ago when James Meredith became the first black student at the University of Mississippi. The only change in racial discrimination is that the whites have learned to discriminate through more sophisticated maneuvers as are identified throughout this testimony. This Congress must strengthen and order a more vigorous enforcement effort of the civil and constitutional rights of blacks, minorities and women.

The situation in Mississippi is so grave, and the inaction by OCR so serious, that I have sent a special appeal to President Reagan asking his intervention to ensure that discrimination in our schools is not allowed to continue to be ignored by OCR.

I recognize that the allegations I have made here today and in the complaints I have described are serious ones, but let me assure you that we have full documentation to support them and to warrant investigation by OCR. The Office of Civil Rights is simply not fulfilling its responsibilities. Perhaps you can ascertain why.

Mr. Edwards. Dr. Kinsey, Mr. Reynolds, the Assistant Attorney General for Civil Rights at the Department of Justice, announced the other day that it would now be the policy of the department to join with school districts seeking to overturn desegregation orders that include busing.

From your experience in Mississippi, can you tell us what kind of an effect that would have if the Justice Department joined with the school districts and asked the courts to discontinue whatever busing programs there are for desegregation?

Mr. Kinsey. Yes. In response to that, it would have a serious impact. In fact, it would turn back the clock and go back to nonintegrated school settings. For an example, most of the State of Mississippi is rural. Therefore, in order to integrate students, you must bus because you have two communities, a black and a white community.

The other problem with that, as we see it, it would violate the court order of 1970, which says that we must end segregation of students in the schools. We are very much concerned of schools coming from underneath the court order, and I think that busing and doing what the Assistant Attorney General has suggested will certainly have an impact on the court order.

I would like to just comment for a minute, if I may. We presently have problems with the school systems using two sets of buses, one to bus black kids, where you have a black driver, and one where you have a white driver who will bus white students, and yet they live in the same neighborhood. Many times they will reroute a black bus driver to bypass white students in order for the white driver to pick them up. But the real impact we think would be a tragedy and certainly should not happen.

Mr. Edwards. Well, Mr. Reynolds' response to that would be that there are other ways to desegregate the Nation's schools: using magnet schools, using other voluntary methods. What is your response to that?

Mr. Kinsey. My response would be that you already have white students jumping school districts and county lines to avoid integration. So I think that his suggestion would fall right back in my previous statement that you would not have integrated schools if people had to volunteer their efforts to do what he is saying.

I don't think it will work, and we certainly would be opposed to such action if the Department of Justice would enjoin in such efforts.

Mr. **EDWARDS**. Thank you.

Ms. Kohn, in your testimony you referred to the *University of Richmond* v. *Bell* case. Is that the case that the Civil Rights Commission was upset about and chastised the Education Department for not appealing?

Ms. **KOHN**. Yes, that is the case.

Mr. **EDWARDS**. Well, why is it so important for an appeal to be taken here? What is this case all about?

Ms. **KOHN**. The case involved a university, the University of Richmond, which went to court to prevent the investigation of an intercollegiate athletic complaint in its intercollegiate athletic program, to prevent the Department of Education from investigating the complaint.

The school claimed—and the court agreed with the school—that the intercollegiate athletic program did not receive earmarked Federal funding for its intercollegiate athletic program. Therefore, title IX did not apply to the program.

The Government argued in the court that title IX did apply to the program and they should be permitted to investigate. When the decision came down, it was a very restrictive decision in the sense of saying that there could be no investigations whenever the department could not show in advance of an investigation that the particular activity received directly earmarked funds for that activity from the Federal Government.

The case was not appealed, yet the Government had taken a very different position before the decision was issued. There are many reason why the failure to appeal is so significant.

First of all, the order was very, very broad, and it is effectively going to prevent the Office of Education from doing virtually anything in the eastern district of Virginia.

Second, other courts have gone the other way. The third circuit has recently had two decisions which go in exactly the opposite direction and reached the opposite result.

The Department of Education chose to ignore those things, and the Assistant Attorney General for Civil Rights, Mr. Reynolds, has said that he likes the Richmond decision better than he likes other court decisions, and that is one of the main reasons why they determined not to appeal this case.

The Government is abandoning its responsibilities here and is permitting, without pursuing an appeal, which they have every right to pursue and varied legal grounds on which to pursue it, its investigatory and enforcement powers to be cut substantially.

I think it is extremely important to realize that the Assistant Secretary for Education, Mr. Singleton, advised the Secretary, Mr. Bell, to take the appeal in this case.

I have attached to my testimony a memorandum that he submitted to the Secretary well in advance of the timeframe on this particular matter, stating all of the terrible things that would happen if the case was not overturned. That for itself to me is the proof of the pudding that Secretary Bell has no commitment to civil rights enforcement.

Mr. **Edwards**. Thank you very much.

Ms. Mattox, you discussed the establishment by the Education Department of these whole categories for different Section 504 cases. Does this mean that complaints in the hold categories are not being processed at all?

Ms. **Mattox**. I get some reports from the regents that say yes, they are not being processed at all. The directions from the Assistant, then the Deputy Assistant Secretary for Civil Rights, said that this shouldn't impede the processing of complaints, but in fact it has because regents simply don't know what to do with these complaints once they get them.

Mr. **Edwards**. Is the law pretty clear on what they are supposed to do with them?

Ms. **Mattox**. The law is clear but the practice is not.

Mr. **Edwards**. Well, I will have some more questions in a moment, but first, Mr. Boyd.

Mr. **Boyd**. Thank you, Mr. Chairman.

Ms. Kohn, you mentioned the third circuit decision in opposition to the *Richmond* decision. What is the date on that decision?

Ms. **Kohn**. There are two decisions. There is the *Grove City College* v. *Bell* decision, which was issued on, I believe it is, August 12, 1982, practically a month before the date on which the notice of appeal had to be filed in the *Richmond* case.

There is a second decision which came down on the very same day that the time ran out for the notice of appeal, and that is September 7. The decision there is *Haffer* v. *Temple University*.

I might note that, of course, filing a notice of appeal preserves the department's right to pursue that appeal and would not commit them to say what their position is going to be in the appeal; merely to say that they are preserving their right to appeal, they do not have to file their appellate briefs on that day, but just reserve their right to pursue the appeal.

Mr. **Boyd**. Doesn't the *Grove City* decision come to the conclusion that the program as used in title IX must be defined as the entire institution of Grove City College?

Ms. **Kohn**. It does. The *Grove City* case says that, and the court in Richmond said that the same kind of funds that were at stake in the *Grove City* case didn't constitute funds——

Mr. **Boyd**. How many funds were involved in the *University of Richmond* case?

Ms. **Kohn**. How many?

Mr. **Boyd**. How much?

Ms. **Kohn**. Hundreds of thousands of dollars.

Mr. **Boyd**. I think the issue was $1,900 in library funds, wasn't it?

Ms. **Kohn**. No. The record in the *Richmond* case shows, and it is stipulated in that record by both parties, that there were numbers of students, hundreds of students that received guaranteed student loans and that received basic educational opportunity grants.

Mr. **Boyd**. Well, I am saying that OCR's determination of authority rested, according to the court in Richmond, on the university's receipt of a $1,900 library resource grant.

Ms. KOHN. One of the problems with the *Richmond* decision is that there are factually incorrect conclusions reached by the court that are inconsistent with the stipulations of the parties.

Mr. BOYD. Is there a case in the fourth circuit which is contrary to the *Richmond* decision?

Ms. KOHN. Yes, there is.

Mr. BOYD. When was that decided?

Ms. KOHN. It was decided in the district court in 1974 and confirmed by the court of appeals of the fourth circuit in 1975. The name of the case is *Bob Jones University* v. *Johnson.*

Mr. BOYD. Are you familiar with *Board of Public Education* v. *Finch*?

Ms. KOHN. Yes. That is a fifth circuit decision that I believe was 1974. It might have been as late as 1976.

Mr. BOYD. Permit me, please, to read from that decision. It says:

> Schools and programs are not condemned en masse or in gross with the good and the bad condemned together, but the termination power reaches only those programs which would utilize Federal money for unconstitutional ends. Under this procedure, each program receives its own day in court.

Now, isn't it correct that the U.S. Supreme Court last May, on May 17, cited that case with approval insofar as it determined what "specific" meant?

Ms. KOHN. Could you repeat the last part of what you said?

Mr. BOYD. Isn't it a fact that the U.S. Supreme Court in part 4 of its opinion last May 17, 1982, *North Haven Board of Education* v. *Bell* cited that case with approval?

Ms. KOHN. Yes, they did cite that case with approval. But let me point out that in the *Haffer* decision, which has really the same kind of facts, we have a university in which students receive basic educational opportunity grants and guaranteed student loans, including student athletes.

We have students who work in the athletic program in both institutions—this is on the record in both courts—80 percent of whose salaries are paid with Federal funds. We have those students in the athletic program, and the athletic program specifically, making special use of buildings that have been constructed with Federal loans, grants and interest subsidies.

We are not merely talking about a $1,900 library grant. We are also talking about the investigatory power of the department as to whether they can go in and explore to see whether there is discrimination. We have not reached in either of those cases the issue of fund termination.

Mr. BOYD. Are you familiar with, of course, your comments as quoted by the Post in the *Richmond* case, in which you called the judge's decision a disgrace? Is that an accurate quote?

Ms. KOHN. I believe I said that it was a disgrace that the Department of Education had not appealed the decision. That was what I was referring to.

Mr. BOYD. Are you similarly critical of the first circuit's decision in *Rice* v. *Harvard University*?

Ms. KOHN. Yes. I don't think that that decision is a wise one, either, and I would point out that the decisions in the northern district of Texas and in Michigan, that the *Richmond* case relied upon, are on appeal to those circuits.

Mr. **Boyd**. So your criticism is essentially one of law rather than policy, is that correct?

Ms. **Kohn**. I am criticizing those decisions as being legally flawed and bad legal decisions, but I am criticizing——

Mr. **Boyd**. But the first circuit would disagree with your conclusion, would it not?

Ms. **Kohn**. The fourth circuit?

Mr. **Boyd**. The first.

Ms. **Kohn**. The first. Yes, but I am criticizing the department for failing to take an appeal when there are numerous legal grounds on which that appeal could and should have been taken. We are not asking them to take some outlandish, far out position in order to pursue their civil rights authority.

Mr. **Boyd**. But if they were to respond, Ms. Kohn, that their political and philosophical view is consistent with court holdings on the other side of the issue, then they would be within their legal rights, would they not?

Ms. **Kohn**. They are within their rights except that what that does is it takes us back to what Mr. Rauh was saying this morning, that indeed the philosophical bent of the officials and the administration is such that they are not going to enforce these laws, that they are not taking every step they can to see that the laws are developed in a way——

Mr. **Boyd**. They are enforcing existing case law, Ms. Kohn, with which you may happen to disagree.

Ms. **Kohn**. They are choosing to allow a decision to remain at the district court level which could have been appealed. I agree that they have the responsibility to follow court orders. I am not suggesting that they defy court orders.

But they have—for example, in the last administration on the question of whether title IX covered employment, several courts of appeals held initially that title IX did not cover employment. The administration consistently pursued its argument that title IX covered employment and indeed were vindicated by the Supreme Court in the *North Haven* decision when it said that title IX was intended to cover employment.

I think that an agency which is given responsibility to enforce civil rights laws should maintain their authority and take those legal steps which are available to them, like an appeal, to protect their enforcement powers and to enforce the law to the fullest extent possible.

Mr. **Boyd**. So you are criticizing Secretary Bell for altering the policy of the government by withdrawing coverage for employment under title IX. Is that correct?

Ms. **Kohn**. Oh, yes, I do criticize him for trying to do that. He was unsuccessful in doing that, but that is what he wanted to do.

Mr. **Boyd**. Didn't he take that action in response to four circuit court of appeals decisions? Isn't it a fact the Carter administration withdrew support for the same reasons?

Ms. **Kohn**. No, the Carter administration did not withdraw support. Indeed, it was very clearly this administration that made the decision to withdraw that policy. The decision was so outrageous that the Justice Department, which has been criticized on a number of issues, was not ready to permit the Secretary to withdraw those regulations while the matter was pending before the Supreme Court.

Mr. BOYD. Are you familiar with a June 5, 1979, memorandum from Cindy Brown to regional directors which says, and I quote, "Several courts have held that title IX does not give HEW authority to regulate the employment practices of recipients of Federal assistance, although the issue is still being litigated in appellate courts." She calls further on in that memorandum for a cessation of activity consistent with those court decisions.

Are you familiar with that memorandum?

Ms. KOHN. Yes, I am, and I think what is significant about that is that there the Department was in those jurisdictions prohibited from pursuing their employment complaints. They ceased, as they were ordered to by the court.

But in other cases where the law had not been decided, they continued to pursue their claim that title IX was supposed to cover employment. They pursued that through and kept those cases being appealed and were ultimately successful in convincing the second circuit, and in a partial victory in the fifth circuit, in convincing two other courts that employment was covered.

They do have to abide by a court ruling when there is a court ruling, but they attempted in each of those cases to take it all the way up, and in the four circuits that preceded the second circuit decision, the Supreme Court refused to take cert.

Mr. BOYD. So you would agree, then, that there is law on both sides of the issue? Is that correct?

Ms. KOHN. There is no longer law on both sides of the issue on the matter of employment. There was for a period of time a split in the circuits. At the present time it is clear that employment is covered by title IX.

As to the question of whether direct receipt of funding is necessary, there is law on both sides, there are decisions that reach different conclusions; yes, I agree with that.

Mr. BOYD. Thank you.

I would like one more question, if I may, Mr. Chairman, to Dr. Kinsey.

You criticized Secretary Bell for his enforcement of the civil rights laws. What is the ultimate sanction available to OCR?

Mr. KINSEY. Would you repeat your question? I didn't understand it.

Mr. BOYD. What is the ultimate sanction available to OCR?

Mr. KINSEY. I would think that the OCR should be——

Mr. BOYD. Isn't it the termination of funds? Isn't that the ultimate sanction?

Mr. KINSEY. Are you asking me should the funds be taken away from OCR?

Mr. BOYD. No, I am asking you if that is the ultimate sanction which OCR has.

Mr. KINSEY. No, I think you should strengthen OCR, give them the necessary funds, and also the legal clout to do its job.

Mr. BOYD. Is the present ultimate sanction the termination of funds, Dr. Kinsey?

Mr. KINSEY. No. We are not asking to terminate their funds, if that is what you——

Mr. Boyd. I am asking—well, hasn't Secretary Beil employed the sanction of termination of funds in Mississippi?

Mr. Kinsey. Oh. Not since he has been Secretary, to my knowledge.

Mr. Boyd. How about last year in Perry County, Miss.?

Mr. Kinsey. Last year?

Mr. Boyd. Yes.

Mr. Kinsey. In what case?

Mr. Boyd. Perry County, Miss.

Mr. Kinsey. In Perry County. OK. I believe that was resolved.

Mr. Boyd. Do you know when the last time that any Secretary of Education or HEW, its predecessor Department, terminated funds?

Mr. Kinsey. Yes. When President Carter was in office, in the county in which I reside, Oktibbeha County, funds were terminated because——

Mr. Boyd. I believe that is incorrect, Dr. Kinsey. I believe the last time funds were terminated was in 1972 when Richard Nixon was President.

Mr. Kinsey. I beg your pardon. In 1980 or 1981 in Oktibbeha County funds were terminated by the Secretary, in Oktibbeha County.

Mr. Boyd. Well, then I think the minority would appreciate it if you would provide evidence of that termination for the record.

Mr. Kinsey. I certainly will.

[The information follows:]

Department of Health, Education, and Welfare,
Washington, D.C.

Mr. Thad E. Easterwood,
Superintendent, Oktibbeha County School District,
Starkville, Miss.

Dear Superintendent Easterwood: I regret that I must inform you that the Oktibbeha County School District, Starkville, Mississippi, is not eligible for a grant under the Emergency School Aid Act (ESAA).[1]

I am providing the reasons for the determination, citations to pertinent legal requirements, and information on how a district may change its status and become eligible for ESAA funds.

We have reviewed your district's application for an ESAA grant and other data, including Forms OS/CR 532-1 and 532-2. We also have reviewed all information which the Office for Civil Rights (OCR) obtained during the on-site review conducted on September 10 through 14, 1979 and subsequent phone conversations with your staff on January 8 and 10, 1980.

On the basis of this review, we find that the district does not meet the ESAA eligibility requirements because disciplinary sanctions are imposed on students in a manner which discriminates against minority group children on the basis of race, fulltime classroom teachers are assigned to schools in such a manner as to identify certain schools as intended for students of a particular race, and employee fringe benefits are allotted in a manner which discriminates against minority group staff.

The review indicated that the district does not have a uniformly administered and objective disciplinary policy.

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[1] The version of ESAA previously in effect (Title VII of Pub. L. 92-318, as amended, 20 U.S.C. section 1601 *et seq.*) was repealed effective September 30, 1979, and an amended ESAA was enacted as Title VI of the Elementary and Secondary Act of 1965 (20 U.S.C. section 3191 *et seq.*). Both the repeal and the enactment were part of the Education Amendments of 1978 (Pub. L. 95-561). Proposed regulations implementing the new ESAA statute were published on June 29, 1979 (44 Fed. Reg. 38364). When these regulations are republished in final form, they will govern determinations of eligibility under the statute. Until this time, except where the new statute differs from the old statute, the Department will apply the program regulations contained in 45 C.F.R. Part 185.

An analysis of the 1978–79 and 1979–80 disciplinary records in the district indicated that the administration of disciplinary sanctions at Maben Elementary School and Maben High School has the effect of discriminating against minority group children.

At Maben Elementary, which has a 57% minority student body, all five students suspended for less than ten days were minorities. An analysis of the school's discipline records shows that minorities and nonminorities were not given similar punishment for similar offenses. For example, three black students and one white student with similar disciplinary records were referred for punishment for fighting. While the three black students were given three to five licks, the white student was merely warned.

At Maben High School, which has a 60 percent minority student body, 37 out of 43 (86 percent) students suspended for less than ten days were minorities. Furthermore, all four students suspended for more than ten days were minorities. An analysis of the school's discipline records shows the following instances where blacks and whites with similar disciplinary records were not given similar punishment for similar offenses:

1. For eating in class, five black students were given one to five licks while one white student was merely talked to.
2. For throwing objects, three black students were given three licks while one white student was talked to.
3. For name calling, one black student was given three licks while two white students were warned.
4. For a variety of similar offenses, one black student was talked to once, given three licks four times, and suspended three times while a white student was talked to seven times and given three licks two times.

Furthermore, although all of the school's 43 students who refused corporal punishment were suspended, 37 of these students were minorities. Thus, the district's policy of suspending students for refusing corporal punishment has the effect of discriminating against minority students because minority students are disproportionately given corporal punishment.

Based upon these findings, I conclude that your district's disciplinary practices are in violation of section 606(c) of the statute, as interpreted by section 185.43(d)(4) which provides that:

"No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any practice, policy, or procedure which results or has resulted in discrimination against children on the basis of race, color, or national origin, including but not limited to:

* * * * * * *

"(4) Imposing disciplinary sanctions, including expulsion, suspension, or corporal or other punishment, in a manner which discriminates against minority group children on the basis of race, color, or national origin."

According to teacher assignment data obtained by phone from Ms. Odessa Waldrep of your staff on January 10, 1980, three schools in your district have both minority student enrollments and minority teacher assignments which vary substantially from the racial composition of the total district. We found that your district has a student enrollment which is 76 percent minority with a 58 percent minority elementary teaching staff and a 58 percent minority high school teaching staff. We noted that the following schools had minority student enrollments and teacher assignments which would identify them as intended for students of a particular race:

School	Grades	Percent minority student enrollment	Percent minority teachers
Alexander	K–6	100	85
Alexander	7–12	100	76
Moor	7–12	100	91
Sturgis	K–12	34	38
Sturgis	7–12	34	18

According to section 185.43(b)(2) of the ESAA regulations:

"(2) No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees (or other personnel for which such agency has any administrative responsibility), including the assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin."

Based upon the above findings, I conclude that your district assigns teachers on the basis of race in violation of section 606(c) of the statute, as interpreted by section 185.43(b)(2) of the regulations.

Also, the district has discriminated against minority group staff in its allocation of fringe benefits. For the 1979-80 school year, the prinicipal and one coach at Maben High School and one coach at Sturgis receive free housing and utilities. All three are nonminority. None of the minority staff in the district received such fringe benefits.

According to district officials, these housing facilities were built prior to desegregation, at the former white schools. However, because of the district's faculty assignment practices, these facilities still are only available to white faculty.

Maben High School, which has 60 percent minority students and 24 percent minority faculty, has a white principal and all of the coaches are white. Sturgis, which has 34 percent minority students and 27 percent minority faculty, also has a white principal, and all of the coaches are white. However, the black schools prior to desegregation, Alexander and Moor, still have 100 percent minority students and have a disproportionate number of minority teachers as indicated in the above chart. In addition, the principals and coaches at the two schools are black.

Because principals and coaches are still assigned to schools based on the traditional racial identity of that school, black principals and coaches do not have the opportunity to receive the free housing and utilities available only at the traditionally white schools. This disparity of treatment violates section 606(c) of the statute, as interpreted by section 185.43(b)(2) which is cited in full above.

Your district may become eligible for an ESAA grant in one of two ways. It may request an opportunity to show cause why the ineligibility determination should be revoked and its application considered for funding; or the district may correct the violations and apply for a waiver of ineligibility. A request for a show cause hearing may be directed to: Dr. Shirley McCune, Associate Commissioner, Equal Educational Opportunity Programs, U.S. Office of Education, Room 2001, FOB#6, 400 Maryland Avenue S.W., Washington, D.C. 20202.

The request must be received, not merely sent, within 14 days of the date of this letter. If your district requests the show cause opportunity, an informal conference with representatives of the district will be held within seven days of the receipt of the request. The purpose of a show cause hearing is to give a district an opportunity to demonstrate that the facts supporting our determination are inaccurate or to provide additional information which may alter that determination. The conference is not a forum for working out the terms of a waiver application.

If a district chooses to take action to correct the violations cited, it may apply for a waiver of ineligibility, pursuant to section 606(c) of the Act (20 U.S.C. 3196(c)) and section 185.44 of the ESAA regulations.

An application for a waiver must include information and assurances which show that any activity resulting in ineligibility has "ceased to exist" and will not reoccur after the submission of the waiver application (20 U.S.C. 3196(c)(1); 45 CFR 185.44(b)).

An application for waiver of ineligibility for racially disproportionate disciplinary policies must contain the materials required by 45 CFR 185.44(f):

"(f) Discrimination against children: In the case of ineligibility under section 185.43(d), an application for waiver shall contain evidence that the practice, policy, or procedure prohibited by section 185.43(d) has ceased to exist or occur and that the effects of such practice, policy, or procedure have been remedied or eliminated."

An application for a waiver of ineligibility for discriminatory assignment of teachers must contain the materials required by 45 CFR 185.44(d)(3):

"(3) In the case of ineligibility resulting from discriminatory assignment of teachers as prohibited by section 185.43(b)(2), such applications for waiver shall contain evidence that such agency has assigned its full-time classroom teachers to its schools so that no school is identified as intended for students of a particular race, color, or national origin. Such non-discriminatory assignments shall, in the case of a local educational agency implementing a plan described in section 185.11(a), conform to the requirements of such plan with respect to the assignment of faculty. In the case of local educational agencies not implementing such a plan, or implementing such a plan which contains no provision as to assignment of faculty, such assignments shall be made so that the proportion of minority group full-time classroom teachers at each school is between 75 per centum and 125 per centum of the proportion of such minority group teachers which exists on the faculty as a whole."

An application for a waiver of ineligibility for discriminatory allocation of fringe benefits must contain the materials required by 45 C.F.R. 185.44(d)(4):

"(4) In the case of ineligibility resulting from other discriminatory practices, policies, or procedures prohibited by section 185.43(b)(2), an application for waiver shall contain:

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"(ii) A statement of steps taken by such agency to prevent such discrimination in the future."

The waiver applications are reviewed by the Office of Civil Rights, Department of Health, Education, and Welfare, and decisions as to whether a waiver should be granted are made by the Secretary of the Department. The waiver application should be directed to: Roma J. Stewart, Director, Office for Civil Rights, Department of Health, Education, and Welfare, 330 Independence Avenue, S.W., Washington, D.C. 20201.

If your district intends to apply for a waiver, the request must be received within 21 days of the date of this letter or, if your district has a show cause hearing, within 21 days of the date of the letter notifying you of the results of the hearing. In either case, all requests for a waiver must be received by May 16, 1980. In addition, all supplementary information in support of a waiver request must be received by June 13, 1980. In the absence of your request for a waiver, we will not feel constrained to reserve funds for an application which is approvable in other respects.

This letter relates solely to your district's eligibility for ESAA assistance. The establishment of eligibility does not, by inself, ensure that an application will be funded. An applicant also must satisfy other requirements applicable to the ESAA program and its application must compete successfully with those of other school districts.

Sincerely yours,

Thomas K. Minter,
Deputy Commissioner for Elementary & Secondary Education.

Mr. Boyd. Thank you, Dr. Kinsey.

Thank you, Mr. Chairman.

Mr. Edwards. Ms. Davis.

Ms. Davis. Thank you, Mr. Chairman.

I have one question which I will direct to all the panel, but it was a point raised in the testimony of Ms. Maddox as to the inability of the Office of Civil Rights to comply with the *Adams* timetable.

You have indicated that that condition is further exacerbated by the referral of complaints to the headquarters office. Can you explain that, please?

Ms. Mattox. Well I think part of it is—you have a number of situations. There is a whole series of memos that I attached here about the whole early warning system that the Office for Civil Rights is using in the regions, that the early warning system allows steps in the works so that regional investigators were warned, their supervisors, and above them the office in Washington, about particularly controversial issues that might come up.

One of the reasons why I said that was in getting prepared for the 504 rewrite we were contacting some people in Vermont and some of the other areas, and a field investigator for the Office of Civil Rights in Boston told me that they were constantly writing—they had written a number of letters finding noncompliance and had forwarded those letters to Washington for approval.

That person in Boston told me that none of those letters had yet been received back from the Office for Civil Rights in Washington, so there appears to be—and again the problem, I will admit, is with statistics, how many—there appears to be a problem once those letters go to Washington for final approval.

Ms. Davis. Ms. Kohn, I have one question for you.

You have indicated in your testimony that the review of Letters of Finding suggest that investigators are applying the wrong legal standard to cases under review. I wonder if you might explain that a bit further and why that is significant in the resolution of those complaints.

Ms. Kohn. If the wrong legal standard is applied to the facts—and in the one example I gave, the standard was that there needed to be proof of intent to discriminate, which is not required under title IX or in most of these other cases.

If you must prove intent and don't have proof of intent, then you would not find discrimination, you would not find a violation. The proper standard is that you merely have to show that the effect of the rule and the regulation is discriminatory and treats girls differently from boys or boys differently from girls or men differently from women. It is easier to establish that there has been a violation with the effects test.

By applying the wrong standard we see that a Letter of Finding which should have said there was a violation, finds there is no violation. We find the mistakes in that direction rather than in the other direction. We don't find that the Department of Education finds a violation when there is no violation.

So that the mistakes tend to disadvantage the beneficiaries and do not require the districts to make the changes that they should be making to eliminate discriminatory practices.

Ms. Davis. Do you have any indication that there are directives from the headquarters office to the regional offices indicating that the new standard should be applied?

Ms. Kohn. I think some of these standard problems are caused by a lack of direction from the top. The purpose of the office is to insure that discriminatory practices are stopped, and that school districts that are funded with Federal funds are not discriminating.

Instead, it seems to be that the message to staff and recipients is that we want conciliation at all costs, even if that cost is that there will not be changes in the practices of the school district to insure the discrimination has ended.

We think that the responsibility of the Department is to insure that discrimination ends. If they can do that through conciliation, that is well and good. But if they cannot, then they must use the other tools and remedies available to them because it is their responsibility to see that the discrimination ends, even if it can't be done on a friendly, conciliatory basis.

Ms. Davis. Thank you.

Mr. Edwards. Thanks to all three witnesses. Let me remind you that this subcommittee exercises oversight on civil rights matters, and when you have a message for us such as you have in your testimony today—and I might say that much of your testimony is very distressing insofar as the enforcement of the civil rights laws are concerned—we want to hear about it, even about specific cases.

I am sorry we have to go, but we have other things to do. We thank you very much for your great help.

[Whereupon, at 12:18 p.m. the subcommittee adjourned.]

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